Supreme Court, U.S.
FILED
99 636 OCT 12 1999
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

YAKAMA INDIAN NATION,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LESLIE R. WEATHERHEAD
WITHERSPOON, KELLEY
DAVENPORT & TOOLE
1100 US Bank Bldg.
W. 422 Riverside
Spokane, WA 99201
(509) 624-5265

CHARLES J. COOPER*
ALAN K. PALMER
ANDREW G. MCBRIDE
DAVID H. THOMPSON
COOPER, CARVIN &
ROSENTHAL, PLLC
1500 K Street, N.W.,
Suite 200
Washington, DC 20005
(202) 220-9600

BRIAN S. KOUKOUTCHOS
28 Eagle Trace
Mandeville, LA 70471
(504) 626-4409

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

90PP

QUESTION PRESENTED

Whether under this Court's recent decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999) a state may abrogate an Indian tribe's sovereign immunity by seizing the tribe's property and conditioning its return on the tribe's willingness to waive its sovereign immunity and submit to state forfeiture proceedings.

PARTIES TO THE PROCEEDING

Petitioner is the Yakama Indian Nation.

Respondent is the State of Washington Department of Revenue.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 6

The Judgment Below, Which Permits States To Abrogate Federally Conferred Tribal Sovereign Immunity, is in Conflict with this Court's Recent Decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 6

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Battese v. Apache County, 630 P.2d 1027 (Ariz. 1981) 8

Chemehuevi Indian Tribe v. California State Bd. of Equalization, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987) 8

Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n, 64 F.3d 577 (10th Cir. 1995) 8

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) ..... *passim*

Confiscation Cases, 74 U.S. 454 (1869) 12

Ex parte Young, 209 U.S. 123 (1908) 5, 7

Franchise Tax Bd. of California v. U.S. Postal Serv., 467 U.S. 512 (1984) 9, 10

Herzog Bros. Trucking v. State Tax Comm'n, 533 N.E.2d 255 (N.Y. 1988) 8

In the Matter of 1,750 Cases of Liquor, 633 N.Y.S.2d 702 (N.Y. Sup. Ct. 1995), *aff'd*, 648 N.Y.S.2d 390 (N.Y. App. Div. 1996) 8

Kaul v. Kansas Dep't of Revenue, 970 P.2d 60 (Kan. 1998), *cert. denied*, 1999 U.S. LEXIS 4938 (U.S. Oct. 4, 1999) 8

Kiowa Tribe v. Manufacturing Tech., 523 U.S. 751 (1998) 7, 16, 17

Lawrence v. Chater, 516 U.S. 163 (1996) 2

Matheson v. Kinnear, 393 F. Supp. 1025 (W.D. Wash. 1974) 13

TABLE OF AUTHORITIES – Continued

Page(s)

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 8

Motlow v. State ex rel. Koeln, 295 U.S. 97 (1935)..... 12

New York Ass'n of Convenience Stores v. Urbach, 699 N.E.2d 904 (N.Y. 1998)..... 8

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991).....7, 8, 11, 15, 17

Oklahoma Tax Comm'n v. City Vending of Muskogee, Inc., No. 65,602, 1992 Okla. LEXIS 158 (Okla. July 14, 1992), *cert. denied*, 506 U.S. 1001 (1992) 8

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)..... 13

Osage Tribal Council v. United States Dep't of Labor, No. 97-9564, 1999 U.S. App. LEXIS 18201 (10th Cir. Aug. 4, 1999) 10

Phillips v. Commissioner, 283 U.S. 589 (1931) 13

Seminole Indian Tribe v. Florida, 517 U.S. 44 (1996) 14

Squaxin Island Tribe v. Washington, 781 F.2d 715 (9th Cir. 1986)..... 8

Stagner v. Wyoming State Tax Comm'n, 682 P.2d 326 (Wyo.), *appeal dismissed*, 469 U.S. 876 (1984)..... 9

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 15

State ex rel. Arizona Dep't of Revenue v. Dillon, 826 P.2d 1186 (Ariz. Ct. App. 1991)..... 8

The Crow Tribe of Indians v. State of Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988) 8

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986) 7, 17

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. 92 Buena Vista Ave., 507 U.S. 111 (1993) 12

United States v. Baker, 63 F.3d 1478 (9th Cir. 1995), *cert. denied*, 516 U.S. 1097 (1996) 11

United States v. Grundy & Thornburgh, 7 U.S. (3 Cranch) 337 (1806) 12

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 13

Washington v. Alaway, 828 P.2d 591 (Wash. Ct. App.), *review denied*, 833 P.2d 1390 (Wash. 1992) 12, 13

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 8, 11

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. amend. XI 7, 16

U.S. Const. amend. XIV 1

28 U.S.C. § 1441 3

28 U.S.C. § 1254(1) 1

Wash. Rev. Code § 82.01.060 2

Wash. Rev. Code § 82.24.020 2

Wash. Rev. Code § 82.24.030 2

Wash. Rev. Code § 82.24.130(3) 2, 13

Wash. Rev. Code § 82.24.135 3

Wash. Rev. Code § 82.24.135(1) 9, 12

Wash. Rev. Code § 82.24.135(3) 9

TABLE OF AUTHORITIES – Continued

Page(s)

Wash. Rev. Code § 82.24.135(4) 9

Wash. Rev. Code § 82.24.135(5) 13

Wash. Rev. Code § 82.24.145(2) 4

Wash. Rev. Code § 82.24.250(1)(b) 2

Wash. Rev. Code § 82.24.250(4) 2

Wash. Rev. Code § 82.24.250(7) 2

Wash. Rev. Code § 82.24.260 13

Wash. Rev. Code § 82.24.260(1) 2

OTHER

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 249 (7th ed. 1993) 2

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 176 F.3d 1241 and is reprinted in the Appendix ("App.") to this petition at App. 1a. The order denying rehearing is reprinted at App. 40a. The memorandum opinion of the district court is unreported and is reprinted at App. 16a. The district court's order denying reconsideration is unreported and is reprinted at App. 25a.

JURISDICTION

The order of the Court of Appeals denying rehearing was filed July 13, 1999. App. 40a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution that no state may "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The question presented is whether a state may abrogate an Indian tribe's sovereign immunity by seizing the tribe's property and conditioning its return on the tribe's willingness to waive its sovereign immunity and submit to state forfeiture proceedings. Just last Term, shortly after the Ninth Circuit issued its decision below, this

Court held that "there is 'no place' for the doctrine of constructive waiver in our sovereign immunity jurisprudence." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2227 (1999) (citation omitted). "Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin." *Id.* at 2229. As the Ninth Circuit's decision cannot be squared with this Court's subsequent decision in *College Savings*, the judgment below should be vacated and the case remanded to the Court of Appeals for further consideration in light of *College Savings*. *See, e.g., Lawrence v. Chater*, 516 U.S. 163 (1996); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 249 (7th ed. 1993). Alternatively, the case should be set for plenary review.

Factual Background. The State of Washington imposes a cigarette excise tax that it implements by requiring packages to bear a tax stamp. Wash. Rev. Code §§ 82.24.020, 82.24.030 (App. 43a-47a).[1] State law permits possession of unstamped cigarettes in a variety of circumstances, including possession by licensed wholesalers and retailers, by the United States or its agencies, and by Indian tribes. *Id.* at §§ 82.24.130(3) (App. 47a), 82.24.250(7) (App. 52a), 82.24.260(1) (App. 53a). Washington deems unstamped cigarettes in transit to locations within the State, including Indian reservations, to be contraband if the shipper is not a state-licensed wholesaler and has not given advance notice of the shipment to

---

[1] At the time the relevant events occurred, the Washington Department of Revenue was charged with collecting this excise tax. Wash. Rev. Code § 82.01.060 (App. 42a-43a).

the State. *Id.* at § 82.24.250(1)(b) & (4) (App. 51a). Petitioner Yakama Indian Nation ("the Tribe") is a federally recognized Indian tribe that enjoys sovereign immunity. The Tribe often purchases cigarettes outside the State of Washington for shipment to the reservation and resale to tribal members, including retail shops owned by tribal members.

The Seizure and the Forfeiture Proceeding. On January 16, 1997, the Washington state police, at the direction of the state Department of Revenue ("DOR"), seized a shipment of cigarettes that the Tribe had purchased and shipped to itself via a licensed interstate common carrier. The State's official inventory indicated the seizure of 26,381 cartons of cigarettes with a retail value of approximately $519,000. App. 60a.

On January 17, 1997, the DOR sent the Chair of the Yakama Tribal Council a Notice of Seizure and Sale of Contraband Goods. App. 58a. An attached DOR letter noted the Tribe's ownership of the cigarettes as set forth on the bill of lading that accompanied the shipment. App. 57a. The DOR notice informed the Tribe of the "intended forfeiture" by the State of the Tribe's property, App. 58a, and stated that, "after forfeiture has commenced," the DOR would sell the contraband goods at public auction. App. 58a-59a.

The Tribe demanded the return of its property and the DOR, pursuant to Wash. Rev. Code § 82.24.135 (App. 47a-49a), "sent the [Yakama] Nation notice of an administrative forfeiture hearing." App. 4a. On February 6, 1997, the Tribe removed that forfeiture proceeding to federal district court under 28 U.S.C. § 1441. At the same time,

the Tribe filed a complaint against the DOR in the district court seeking: a declaration that the Tribe enjoyed sovereign immunity from the legal process of the DOR and the Washington state courts; an injunction to stop the state forfeiture proceeding; and an order directing the State to return the Tribe's property. App. 4a.

Due to the perishable nature of the cigarettes, the DOR sold them at auction for $235,000. *Id.* Under Wash. Rev. Code § 82.24.145(2) (App. 50a), the DOR collects the taxes due on such seized goods from the party purchasing the goods at auction. After the taxes were satisfied by the purchaser of the seized cigarettes, the net proceeds of $235,000 were paid into the registry of the federal district court pursuant to a stipulation of the parties. App. 4a. The Tribe seeks recovery of these proceeds.

Proceedings in the District Court. In its answer in the district court, the DOR formally admitted that, as alleged in the complaint, the DOR had "seized [the Tribe's] property," and that "a state adjudicative proceeding" was being instituted by the State before an administrative tribunal of the DOR. App. 38a. The Tribe moved to dismiss the removed state forfeiture proceeding on grounds of sovereign immunity, and also sought leave to amend the complaint to add claims against the individual state officers involved in the seizure and the enforcement of the state forfeiture statute. App. 4a. The DOR moved to dismiss the complaint under the Eleventh Amendment and to remand the administrative forfeiture proceeding. The district court granted the DOR's motions, denied the Tribe's, and stayed disbursement of the auction proceeds to the DOR pending appeal. App. 4a-5a.

The Ninth Circuit Decision. The Court of Appeals affirmed the district court order refusing the Tribe leave to amend its complaint to add individual state officers as defendants, and in doing so the court reached the merits of the sovereign immunity issue. The Ninth Circuit agreed that, under *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment does not bar suit against a state's officers in their individual capacities where the plaintiff seeks only injunctive and declaratory relief, and that such federal relief must be made available when necessary to vindicate federal rights. App. 7a-8a. Yet the court below held that it would be "futile" for the Tribe to amend its complaint because, in any event, the Tribe was not shielded from the state's forfeiture action by federally conferred sovereign immunity:

> The Nation's argument depends on the extent of its sovereign immunity. If that immunity does not extend to shield the Nation from the Department's seizure and forfeiture of the Nation's unstamped cigarettes, then the federal right the Nation asserts does not exist in this case and there is no federal right that requires vindication in federal court.

App. 9a.

The Court of Appeals agreed that "the Nation is a sovereign entitled to sovereign immunity and that, absent a clear waiver by the Nation, or congressional abrogation, a suit against the Nation is barred by sovereign immunity." *Id.* It further agreed that the Washington DOR "must schedule a forfeiture hearing." App. 10a. Yet the court below nevertheless held that application of the State's forfeiture process to the Tribe and its property did

not violate tribal sovereign immunity because the Tribe's "participation in the administrative proceeding is optional":

> The Nation may elect either to challenge the cigarette seizure in an administrative hearing or bring suit in Washington state court . . . . Without question, the practical effect of the seizure is that the Nation has to contest it in one state forum or the other, or suffer the loss of its cigarettes. But if the state's administrative seizure of the cigarettes is not an undue interference with the Nation's sovereign immunity (and under [*United States v.*] *Baker*[, 63 F.3d 1478 (9th Cir. 1995), *cert. denied*, 516 U.S. 1097 (1996)] it is not), the availability of a post-deprivation due process proceeding to challenge that action surely is not.

App. 11a (citation omitted). Accordingly, the Ninth Circuit held that the Tribe's sovereign immunity was not implicated, that the Tribe had no federal right requiring vindication in a federal court, and that it would, therefore, be futile to allow the Tribe to amend its complaint to add individual state officers as defendants.

REASONS FOR GRANTING THE WRIT

THE JUDGMENT BELOW, WHICH PERMITS STATES TO ABROGATE FEDERALLY CONFERRED TRIBAL SOVEREIGN IMMUNITY, IS IN CONFLICT WITH THIS COURT'S RECENT DECISION IN *COLLEGE SAVINGS BANK v. FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD.*

The sovereign immunity possessed by Indian tribes "is a necessary corollary to Indian sovereignty and self-

governance." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). This aspect of tribal sovereignty, like all others, "is subject to plenary federal control and definition." *Id.* at 891. Thus "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe v. Manufacturing Tech.*, 523 U.S. 751, 756 (1998). In violation of this enduring principle of federal law, the decision below permits states to abrogate tribal sovereign immunity and to subject tribes and their property to state forfeiture proceedings.

It is well settled that respondent DOR could not have commenced an administrative or judicial action against the Tribe to recover allegedly unpaid taxes (or for any other purpose). *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 513 (1991). But under the decision below, the State may subject the Tribe to administrative and judicial process by the simple expedient of first seizing tribal property and then conditioning its return on the Tribe's waiver of its immunity from the State's forfeiture proceedings.[2] The resulting judicial process does not violate immunity, the Ninth Circuit has

---

[2] The Ninth Circuit announced its holding on tribal immunity in the context of ruling on the Tribe's motion for leave to amend its complaint to add individual state officers as defendants. As noted, the court ruled that any such amendment would be futile because the Eleventh Amendment would preclude a suit against the state officers. This ruling was based *solely* on the court's conclusion that the Tribe would lose on the merits of its tribal immunity claim and thus was not seeking to vindicate a federal right as required under *Ex parte Young*. Thus, the court's cramped view of tribal sovereign immunity is squarely before this Court.

held, because the Tribe's participation in the state proceedings is "optional," insofar as the Tribe is always free to acquiesce in the State's seizure of tribal property. App. 11a. Thus, the court below rendered the Tribe's sovereign immunity an empty formalism.

Tribal sovereign immunity has long been a source of contention between the states and the Indian nations. In recent years, the states' efforts to collect tax revenue from tribes in connection with the sale of cigarettes, liquor, and other items on reservations has spawned extensive litigation in virtually every state that contains an Indian reservation.[3] The decision below creates a facile and

---

[3] *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (cigarettes); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (cigarettes); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (cigarettes); *Battese v. Apache County*, 630 P.2d 1027 (Ariz. 1981) (ad valorem property tax dispute); *State ex rel. Arizona Dep't of Revenue v. Dillon*, 826 P.2d 1186 (Ariz. Ct. App. 1991) (cigarettes); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987) (cigarettes); *Kaul v. Kansas Dep't of Revenue*, 970 P.2d 60 (Kan. 1998), *cert. denied*, 1999 U.S. LEXIS 4938 (U.S. Oct. 4, 1999) (motor fuel); *The Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1998) (coal); *Herzog Bros. Trucking v. State Tax Comm'n*, 533 N.E.2d 255 (N.Y. 1988) (motor fuel); *New York Ass'n of Convenience Stores v. Urbach*, 699 N.E.2d 904 (N.Y. 1998) (cigarettes and motor fuel); *In the Matter of 1,750 Cases of Liquor*, 633 N.Y.S.2d 702 (N.Y. Sup. Ct. 1995), *aff'd*, 648 N.Y.S.2d 390 (N.Y. App. Div. 1996) (liquor); *Oklahoma Tax Comm'n v. City Vending of Muskogee, Inc.*, No. 65,602, 1992 Okla. LEXIS 158 (Okla. July 14, 1992), *cert. denied*, 506 U.S. 1001 (1992) (cigarettes); *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 64 F.3d 577 (10th Cir. 1995) (beer); *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715 (9th Cir.

transparent end-run around sovereign immunity that, if left standing, will place tribal immunity in this contentious area entirely under state rather than federal control, in violation of a century of this Court's jurisprudence. The Ninth Circuit's decision thus warrants this Court's plenary review. In the alternative, given that the Ninth Circuit did not have the benefit of this Court's recent contrary decision in *College Savings Bank*, the Court may wish to vacate the judgment below and remand the case so that the Ninth Circuit may reconsider its decision in light of *College Savings Bank*.

1. As the court below itself noted, this case arises out of "an administrative forfeiture proceeding that the Department [of Revenue] instituted after it seized the cigarettes." App. 4a.[4] Sovereign immunity " 'embrace[s] all civil process incident to the commencement or continuance of legal proceedings,' " *Franchise Tax Bd. of California v. U.S. Postal Serv.*, 467 U.S. 512, 518 (1984) (quoting *FHA v. Burr*, 309 U.S. 242, 245-46 (1940)), including seizures and attachments and tax assessments. *Id.* at 522-23. Thus,

---

1986) (liquor); *Stagner v. Wyoming State Tax Comm'n*, 682 P.2d 326 (Wyo.), *appeal dismissed*, 469 U.S. 876 (1984) (cigarettes).

[4] As a formal matter, the Washington statute on cigarette tax seizures provides that a proceeding on "[f]orfeiture shall be deemed to have commenced by the seizure." Wash. Rev. Code § 82.24.135(1) (App. 47a-48a). The fact that the property owner defaults under Washington law if it fails to respond to the state notice of seizure and forfeiture, Wash. Rev. Code § 82.24.135(3) & (4) (App. 48a-49a), confirms that it is the State that initiates and drives the forfeiture process.

contrary to the Ninth Circuit's reasoning, tribal immunity is necessarily implicated here because the State cannot forfeit property without an adjudicative hearing, and such a hearing cannot be conducted by the State if the property owner enjoys sovereign immunity.[5]

The court below missed this point because it conflated the seizure of the cigarettes by the state police with the forfeiture of that property by the State:

> [I]f the state's administrative seizure of the cigarettes is not an undue interference with the Nation's sovereign immunity (and under *Baker* it is not), the availability of a post-deprivation due process proceeding to challenge that action surely is not.

App. 11a. This is a *non sequitur*. Even assuming, *arguendo*, that a state has executive power to police the streets and seize what it suspects to be contraband owned by an Indian tribe, it is another question entirely whether the

---

[5] It makes no difference that the forfeiture proceeding instituted by the DOR is administrative rather than judicial, or that the Tribe, as the property owner, supposedly has its "choice" of an administrative hearing or a trial in a Washington state court. *See* App. 11a. Sovereign immunity applies to both kinds of proceedings. *See Franchise Tax Bd.*, 467 U.S. at 518, 522, 524-25. *See also Osage Tribal Council v. United States Dep't of Labor*, No. 97-9564, 1999 U.S. App. LEXIS 18201, at *9 (10th Cir. Aug. 4, 1999) ("[T]he question of tribal sovereignty is conclusive of whether the tribe must bear the burden of the administrative proceeding."). "To distinguish between administrative and judicial process would be to take an approach to sovereign immunity that this Court rejected more than 40 years ago." *Franchise Tax Bd.*, 467 U.S. at 524.

state may subject the tribe to the judicial process necessary to forfeit the property.[6] The seizure merely

---

[6] The Court of Appeals assumed that the State may, without offending sovereign immunity, seize truckloads of unstamped cigarettes owned by a tribe when the cigarettes are en route to the reservation. App. 10a. While that assumption is not at issue here, it is open to question and unsupported by authority. The Ninth Circuit cited *United States v. Baker*, 63 F.3d 1478, 1483 (9th Cir. 1995), *cert. denied*, 516 U.S. 1097 (1996), but that case merely affirmed criminal jurisdiction to seize contraband from *individuals*, including individual Indians, and did not even address the state's supposed power to seize the property of a *sovereign Indian tribe*. Indeed, *Baker* itself expressly noted that the record there did "not indicate the defendants' unstamped cigarettes were intended for sale to 'established governing bodies of an Indian tribe.' " *Id.* at 1488 n.10 (quoting *Gord v. Department of Revenue*, 749 P.2d 678, 683 (Wash. Ct. App. 1987)). In this case it is undisputed that the cigarettes when seized were already the property of the Yakama Indian Nation, and the State knew that.

The Ninth Circuit also relied on *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), but that case involved seizures not from sovereign tribes, but "from out-of-state wholesalers." *Id.* at 161. *See also id.* at 152 (seizures of "shipments of unstamped cigarettes en route to the reservations from wholesalers outside the State"); *id.* at 161 ("sales by wholesalers to the tribal businesses"); *id.* at 144 n.18 ("out-of-state wholesalers"). This Court expressly reserved the question whether Washington could enforce its tax law through seizures from tribal businesses or the tribe itself of "stocks of cigarettes which are intended for sale to nonmembers, and sell these stocks in order to obtain payment of the taxes due." *Id.* at 162. This distinction is confirmed by *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), where this Court noted that a state unable to collect its cigarette taxes directly from a tribe due to tribal immunity could "of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers." *Id.* at

"commence[s]" the forfeiture process, it does not complete it. Wash. Rev. Code § 82.24.135(1) (App. 47a-48a). It is akin to service of process in a civil action. A forfeiture is "not self-executing"; the government's property interest in the seized goods does not "spring[ ] into existence independently." *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 127 & n.20 (1993). The state does not own the property – its title is not perfected or consummated – until "forfeiture has been decreed." *Id.* at 124.[7] And forfeiture cannot be "decreed," as a matter of due process, until the State has afforded the property-owner a post-seizure opportunity to be heard.[8] Even when the state's

---

514. Therefore, there is no authority for the state's arrogation of the power to seize property belonging to another sovereign. But, in any event, this question is not presented here because the Tribe does not contest the State's seizure in this case, but only the State's authority to subject the Tribe to the forfeiture proceeding that is constitutionally required before the State may take title to the seized property and declare it forfeited.

[7] *See also 92 Buena Vista Ave.*, 507 U.S. at 131 (Scalia, J., concurring) (state ownership vests only "upon entry of the judicial order of forfeiture or condemnation"); *Motlow v. State ex rel. Koeln*, 295 U.S. 97, 99 (1935) (state ownership "follows only from an effective judgment of condemnation"); *Confiscation Cases*, 74 U.S. 454, 460 (1869) (The government's title must be "consummated by seizure, suit, and judgment, or decree of condemnation."); *United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 350-51 (1806) (Marshall, C. J.) ("[N]othing vests in the government until some legal step shall be taken for the assertion of its right.").

[8] Cigarettes that do not bear a state tax stamp are not contraband *per se*. They are not items that no one can own, that simply cannot be held as private property (such as a nuclear weapon or crack cocaine), nor are they things "the possession of which, without more, constitutes a crime." *See Washington v.*

taxes are at issue, the state may not forfeit property without a post-seizure due process hearing. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 59-60 (1993); *see also id.* at 69-70 (Rehnquist, C.J., concurring in part); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931) (Brandeis, J.) (unanimous).[9] "The purpose of an adversary hearing is to ensure the requisite neutrality," and that "protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." *James Daniel Good Real Property*, 510 U.S. at 55-56.[10]

Alaway, 828 P.2d 591 (Wash. Ct. App.), *review denied*, 833 P.2d 1390 (Wash. 1992); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). Under Washington law, it is legal for Indians and others to possess unstamped cigarettes in several circumstances. Wash. Rev. Code §§ 82.24.130(3) (App. 47a), 82.24.260 (App. 53a-54a). The owner of this sort of "contraband" "does not automatically lose his property interest" – "the government must follow proper forfeiture procedures to divest him of that interest." *Alaway*, 828 P.2d at 593; *One 1958 Plymouth*, 380 U.S. at 699 (same). Therefore, the State must use proper forfeiture procedure to take title to the Tribe's shipment of cigarettes or to the proceeds of the sale thereof.

[9] The State's statutory cigarette tax enforcement regime has been held to comply with due process only because it mandates prompt judicial review of the legality of the seizure and sale of the property as contraband. *Matheson v. Kinnear*, 393 F. Supp. 1025, 1030 (W.D. Wash. 1974). Respondent has conceded that it must provide a due process forfeiture hearing, Response Br. of Wash. DOR in the 9th Cir. at 10, and the court below has implicitly acknowledged this point as well. App. 10a-11a.

[10] The administrative forfeiture hearing is conducted by an officer of the Department of Revenue. *See* Wash. Rev. Code § 82.24.135(5) (App. 49a); App. 61a (letter of 2/7/97 to tribe from David Prather of DOR).

The State cannot forfeit the Tribe's property without affording a due process hearing. Yet it is clear that such a hearing would violate the Tribe's sovereign immunity by subjecting the Tribe to the State's adjudicative jurisdiction against its will. Therefore, the State simply cannot forfeit the property of a sovereign Tribe. The State must seek alternative means to vindicate its revenue interests such as assessing wholesalers.[11]

2. The Court of Appeals evaded this result by concluding that the Tribe's "participation in the administrative proceeding is optional." App. 11a. Yet the court in the same breath conceded that "the practical effect of the seizure is that the Nation has to contest it in one state forum or the other, or suffer the loss of its cigarettes." *Id.* In other words, unless the Tribe "opts" to waive its sovereign immunity and submit to the State's forfeiture proceedings, the Tribe will be deprived of its property.

Just last Term, three weeks *after* the Ninth Circuit issued its decision in this case, this Court confirmed that "there is 'no place' for the doctrine of constructive waiver in our sovereign-immunity jurisprudence." *College Sav. Bank*, 119 S. Ct. at 2227 (citation omitted). Waivers of

---

[11] As the Indian Commerce Clause makes clear, Congress, not the states, has plenary jurisdiction over the Tribe's commercial activities as a tribe. *See, e.g., Seminole Indian Tribe v. Florida*, 517 U.S. 44, 62 (1996) (States "have been divested of virtually all authority over Indian commerce and Indian tribes."). Thus, tribal sovereign immunity often serves to protect the exclusive federal control over Indian commerce. The unauthorized abrogation of that immunity, as here, injects state law and state process into an area of exclusive federal authority.

immunity must be "altogether voluntary," whether the sovereign is a state, *id.* at 2228, or an Indian tribe. *Potawatomi*, 498 U.S. at 509; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The Ninth Circuit deems the State's coercive forfeiture scheme to be a gracious offer of judicial process rather than an abrogation of tribal immunity. But the offer made by the State, like that made by *The Godfather*, is one the Tribe cannot refuse; the Tribe receives due process, and the opportunity for return of its property, only at the price of surrendering its sovereign immunity.

Allowing the states to extort "constructive waivers of sovereign immunity" by seizing tribal property and holding it hostage would, "as a practical matter," permit the states to abrogate tribal sovereign immunity. *College Savings Bank*, 119 S. Ct. at 2229. "Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin." *Id.*

In *College Savings Bank*, the Court considered a claim under the Lanham Act against an arm of the State of Florida that administered a tuition prepayment program. This Court held that Congress may not extort a waiver of state sovereign immunity as a condition for the state to engage in otherwise lawful commercial activity:

> Nor do we think that the constitutionally grounded principle of sovereign immunity is any less robust where, as here, the asserted basis for constructive waiver is conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations,

> and that otherwise resembles the behavior of "market participants."

119 S. Ct. at 2230.[12] This Court has likewise rejected, with respect to tribal sovereign immunity, a "distinction between governmental and commercial activities of a tribe." *Kiowa*, 523 U.S. at 755.

As the Court put it in *College Savings Bank*, "the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." 119 S. Ct. at 2231. That principle applies *a fortiori* to this case. What the Tribe is threatened with if it refuses to waive its immunity is not the mere loss of commercial opportunities, or the mere denial of some government benefit or gratuity, but the loss of its property without due process of law.

To be sure, the State's inability to extort a waiver of sovereign immunity from the Tribe may restrict the tools it employs to collect its cigarette tax. Here, however, the State has already collected its tax, after selling the seized cigarettes at auction. But since the State cannot subject the sovereign Tribe to its forfeiture proceeding, and cannot, under the Due Process Clause, take title to seized property without such a hearing, the State must return the net proceeds of the cigarette sale to the Tribe. This

---

[12] Of course, we deal here with tribal immunity rather than the State's Eleventh Amendment immunity, but since tribal immunity "is not subject to diminution by the States," and the waiver at issue here has been coerced not by Congress, but by a state, the analysis is the same. *See Kiowa*, 523 U.S. at 755.

Court has repeatedly recognized that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755; *see Potawatomi*, 498 U.S. at 514. An array of "adequate alternatives" is available to states for enforcement of cigarette taxes, as this Court noted in *Potawatomi*. 498 U.S. at 514.[13] Any "perceived inequity" in denying Washington State the more direct means of forfeiture actions against the Tribe and its property is the result of the enduring principle of sovereign immunity, and "simply must be accepted in view of the overriding federal and tribal interests in these circumstances." *Three Affiliated Tribes*, 476 U.S. at 893.

CONCLUSION

The Ninth Circuit's endorsement of coerced waivers of sovereign immunity cannot be reconciled with this Court's subsequent decision in *College Savings Bank*. Accordingly, the petition for a writ of certiorari should be granted, the judgment of the Court of Appeals vacated, and the case remanded for reconsideration in light of

[13] Those options include negotiating agreements with tribes, seeking appropriate legislation from Congress, and collecting the tax, by assessments and seizures, from the cigarette wholesalers who sell unstamped cigarettes to the tribes. 498 U.S. at 514. *See supra* note 6.

College Savings Bank. Alternatively, the petition should be granted, and the case set for plenary review.

Respectfully submitted,

LESLIE R. WEATHERHEAD
WITHERSPOON, KELLEY
DAVENPORT & TOOLE
1100 US Bank Bldg.
W. 422 Riverside
Spokane, WA 99201
(509) 624-5265

CHARLES J. COOPER*
ALAN K. PALMER
ANDREW G. MCBRIDE
DAVID H. THOMPSON
COOPER, CARVIN &
ROSENTHAL, PLLC
1500 K Street, N.W.,
Suite 200
Washington, DC 20005
(202) 220-9600

BRIAN S. KOUKOUTCHOS
28 Eagle Trace
Mandeville, LA 70471
(504) 626-4409

* *Counsel of Record*

October 12, 1999

APPENDIX A

YAKAMA INDIAN NATION, Plaintiff-Appellant,
v. STATE OF WASHINGTON DEPARTMENT
OF REVENUE, Defendant-Appellee.

No. 98-35068

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

176 F.3d 1241; 1999 U.S. App. LEXIS 11129; 99 Cal. Daily Op. Service 4091; 99 Daily Journal DAR 5201

June 1, 1999, Filed

COUNSEL: Leslie Weatherhead, Witherspoon, Davenport, Kelley & Toole, Spokane, Washington, for the plaintiff-appellant.

John Barnes, Assistant Attorney General, Olympia, Washington, for the defendant-appellee.

JUDGES: Before: Harry Pregerson and David R. Thompson, Circuit Judges, and Barry Ted Moskowitz, District Judge.[1] Opinion by Judge Thompson.

OPINION BY: DAVID R. THOMPSON

OPINION: OPINION

THOMPSON, Circuit Judge:

---

[1] The Honorable Barry Ted Moskowitz, United States District Court Judge for the Southern District of California, sitting by designation.

OVERVIEW

The Yakama Indian Nation ("the Nation") appeals the dismissal of its declaratory judgment and injunctive relief action against the State of Washington Department of Revenue ("the Department"). In that action, the Nation challenged, on the ground of sovereign immunity, the Department's seizure of unstamped packages of cigarettes owned by, and being transported to, the Nation. The Nation argues that the district court erred by immunizing the state against suit under the Eleventh Amendment and by denying the Nation's request to amend its complaint to include ultra vires claims against state officers. We have jurisdiction under 28 U.S.C. § 1291 to review the dismissal of the original action and the denial of leave to amend, and we affirm those decisions.

The Nation also appeals the district court's order remanding an administrative forfeiture proceeding that the Department instituted after it seized the cigarettes, and which the Nation removed to the district court. Because 28 U.S.C. § 1447(d) precludes appellate jurisdiction to review the remand order, we dismiss that portion of the appeal.

BACKGROUND

Washington taxes the sale, use, consumption, handling, possession, and distribution of cigarettes. *See* Wash. Rev. Code § 82.24.020. The Department enforces this tax law, which provides that, absent some exceptions, cigarette packages possessed in Washington must bear applicable stamps as proof of tax payment. *See id.* § 82.24.030. "Although Indians are permitted to buy

unstamped, tax-exempt cigarettes on Indian reservations located within the State of Washington, all deliveries of unstamped cigarettes to Indian reservations in Washington must be preapproved by [the Department]." *United States v. Baker*, 63 F.3d 1478, 1483 (9th Cir. 1995) (citing Wash. Admin. Code § 458.20.192). Preapproval is obtained by giving advance notice to the Department. In the absence of such notice, any unstamped cigarettes are considered contraband, *see id.*, and are subject to seizure and sale. *See* Wash. Rev. Code § 82.24.250(4); *Baker*, 63 F.3d at 1489.

On January 16, 1997, a Washington state patrol trooper asked the driver of a truck and trailer that had just crossed the scales of a weigh station near Plymouth, Washington, to produce all paperwork related to his shipment. The driver produced a bill of lading indicating that he was carrying a load of cigarettes apparently owned by and bound for the Nation in Toppenish, Washington. While checking the load of the truck, the state trooper noticed individual cigarette packages that did not bear the state tax stamps. The state trooper contacted the Washington Department of Revenue and was informed that the Department had not received notification of the transport of unstamped cigarettes to the Nation. The state trooper then obtained a search warrant from the Benton County Superior Court, searched the truck, seized the load of cigarettes, inventoried them, and stored them in a warehouse.

The Department notified the Nation that the cigarettes had been seized as contraband under Washington law. The Nation then wrote a letter to the Department demanding the return of the cigarettes. Pursuant to

Washington Revenue Code section 82.24.135, the Department sent the Nation notice of an administrative forfeiture hearing, during which the Nation would be afforded an opportunity to challenge the seizure and to assert its claim to the cigarettes.

Instead of participating in the hearing, the Nation filed a complaint against the Department in the district court seeking (1) a declaration that the State of Washington and its courts and tribunals cannot exercise jurisdiction over a sovereign nation and that the Nation is immune from suit by the Department; (2) an injunction prohibiting the Department from proceeding with the administrative hearing; and (3) an order requiring the Department to return the Nation's cigarettes or the proceeds from their sale. At the same time, although in a separate action, the Nation, relying on 28 U.S.C. § 1441, removed the administrative forfeiture proceeding to the district court. The district court did not order the two cases consolidated.

Because of the perishable nature of the cigarettes, the Department sold the cigarettes at auction for $235,000. The proceeds from the auction were paid into the registry of the district court pursuant to stipulation of the parties and order of the court.

The Nation moved to dismiss the removed forfeiture proceeding, arguing that the Department could not exercise jurisdiction over a sovereign nation. The Nation also sought leave to amend its original action to include ultra vires claims against individual state officers. The Department moved to dismiss the Nation's complaint under the Eleventh Amendment and to remand the removed

administrative proceeding to the state administrative tribunal. The district court granted both of the Department's motions, denied the Nation's motions, and ordered disbursement of the auction proceeds to the Department. The court later denied the Nation's motion for reconsideration, but stayed disbursement of the auction proceeds to preserve the status quo pending appeal.

DISCUSSION

A. The State's Eleventh Amendment Immunity

We first consider whether the Eleventh Amendment bars the Nation's lawsuit against the State of Washington for declaratory and injunctive relief and for return of the cigarette proceeds. Immunity under the Eleventh Amendment is a question of law that we review de novo. *See Micomonaco v. Washington*, 45 F.3d 316, 319 (9th Cir. 1995).

The Eleventh Amendment bars suits against a state or its agencies, regardless of the relief sought, unless the state unequivocally consents to a waiver of its immunity. *See Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984)); *see also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 788, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991) (holding that a state's Eleventh Amendment immunity extends to suits by Indian tribes). The state's consent must be "unequivocally expressed," *Pennhurst State Sch. & Hosp.*, 465 U.S. at 99, meaning that the consent is effective "only where stated by the most express language. . . . " *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305, 109

L. Ed. 2d 264, 110 S. Ct. 1868 (1990) (internal quotation and citation omitted).

The Nation contends that the state consented to suit by "involving itself in federal court litigation" and "depositing the cigarette proceeds into the court's register." We reject this argument because the state did not unequivocally express its assent to suit. As the district court correctly noted, the Department asserted sovereign immunity as an affirmative defense in its first responsive pleading, which was filed before the parties stipulated to the deposit of the cigarette proceeds into the district court's registry. Given the Department's clear assertion of sovereign immunity in its pleadings, its agreement to deposit the forfeited proceeds into the court registry pending litigation was simply an act of cooperation, not an unequivocal consent waiving sovereign immunity. Because the state did not unequivocally waive its Eleventh Amendment immunity, the district court did not err in dismissing the Nation's complaint on that ground.

B. The Nation's Motion to Amend

The Nation argues that the district court erred in denying its motion to amend its complaint to include ultra vires claims against individual state officers not named in the original complaint. According to the Nation, these individuals were "involved in the actual seizure in question and [were] the individuals responsible for the enforcement of the statute under which the Department claimed authority to seize and forfeit the Tribe's property." The Nation contends that these state

officers acted ultra vires in violating the Nation's sovereign immunity.

We review for abuse of discretion a district court's refusal to grant leave to amend after a responsive pleading has been filed. *See Schlacter-Jones v. General Tel. of Cal.*, 936 F.2d 435, 443 (9th Cir. 1991). Amendment under the Federal Rules of Civil Procedure should be granted "unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." *Martinez v. Newport Beach City*, 125 F.3d 777, 785 (9th Cir. 1997).

The district court denied the Nation leave to amend, concluding that Eleventh Amendment immunity also protected the state officers from suit – in essence holding that the Nation's proposed amendment would be futile because it would fail as a matter of law on a motion for summary judgment. *See Roth v. Garcia Marquez*, 942 F.2d 617, 628-29 (9th Cir. 1991). To determine whether the district court abused its discretion by this ruling, we consider whether Eleventh Amendment immunity would bar claims against the individual state officers as a matter of law, rendering the Nation's proposed amendment futile.

The Supreme Court has held that a suit against state officers acting in their individual capacities does not violate a state's Eleventh Amendment immunity in certain circumstances where the claimant is seeking only declaratory and injunctive relief. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) (citing *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)). The four circumstances in which

such declaratory and injunctive relief actions against individual state officials have been allowed to proceed in federal court are when (1) state officials are plainly acting outside their statutory authority, *see Coeur d'Alene Tribe*, 521 U.S. at 270; (2) no state forum exists to vindicate federal interests, *see id.* at 270-74; (3) " 'it is necessary to permit the federal courts to vindicate federal rights,' " *id.* at 277 (quoting *Papasan v. Allain*, 478 U.S. 265, 277, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)); and (4) "a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law." *Coeur d'Alene Tribe*, 521 U.S. at 288 (O'Connor, J., concurring). We consider each of these aspects of the *Young* doctrine in turn.

1. Acting Outside of Statutory Authority

A state officer acts ultra vires "only when he acts without any authority whatever." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 101 n.11 (internal quotations and citation omitted). Washington law permits state officials to seize as contraband unstamped cigarettes bound for Indian tribes when the tribe has not notified the Department of the shipment. *See* Wash. Rev. Code § 82.24.250. In addition, the Supreme Court has specifically approved of states enforcing their tax laws through the off-reservation seizure of unstamped cigarettes. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161-62, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980); *see also Baker*, 63 F.3d at 1483. Clearly, the state officials here were acting within their delegated authority when they seized the cigarettes, sold them at auction, and scheduled an administrative hearing.

2. State Forum to Vindicate Federal Interests

A state forum existed for the vindication of the Nation's federal interests. Along with having a right to challenge the seizure in the state administrative forum, the Nation had the option of bypassing that forum and instead bringing an action in state court. *See* Wash. Rev. Code § 82.24.135(5); *Comenout v. Washington*, 722 F.2d 574, 578 (9th Cir. 1983).

3. Vindication of a Federal Right in Federal Court

It is undisputed that the Nation is a sovereign entitled to sovereign immunity and that, absent a clear waiver by the Nation, or congressional abrogation, a suit against the Nation is barred by sovereign immunity. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991). The Nation contends that, by reason of its sovereign immunity, it has a federal right not to have its cigarettes seized and forfeited by the Department. To vindicate this federal right, the Nation argues it should be permitted to amend its complaint to include ultra vires claims against the individual state officers who participated in the seizure and forfeiture.

The Nation's argument depends on the extent of its sovereign immunity. If that immunity does not extend to shield the Nation from the Department's seizure and forfeiture of the Nation's unstamped cigarettes, then the federal right the nation asserts does not exist in this case and there is no federal right that requires vindication in federal court.

In support of its argument, the Nation contends the cigarettes cannot be "contraband" subject to seizure unless an adjudicative tribunal lawfully makes such a determination; such a lawful adjudication requires subjecting the Nation to the tribunal's jurisdiction; the Nation's sovereign immunity protects it from being subjected to the state's jurisdiction without its consent; because the Nation did not consent to the state's jurisdiction, the state cannot treat the cigarettes as "contraband"; thus, the state's seizure and sale of them was unlawful.

We reject this argument. The premise on which it is founded is false. The notion that the State of Washington can treat the Nation's cigarettes as contraband only after an adjudicative hearing with properly conferred jurisdiction over the Nation simply is not so. We have held that, absent advance notice to the Department, the shipment of unstamped cigarettes to purchasers on an Indian reservation in Washington renders the cigarettes "contraband subject to seizure and sale." *Baker*, 63 F.3d at 1483; *see also* Wash. Rev. Code § 82.24.250. Although the Department must schedule a forfeiture hearing to allow a claimant to seek the return of seized property, *see* Wash. Rev. Code § 82.24.135(5), a hearing to determine whether unstamped cigarettes are contraband is not a prerequisite to their seizure as contraband nor to their sale at auction as a perishable commodity. Because the Department had the right to treat the cigarettes as contraband, it had the right to seize and sell them. *See Baker*, 63 F.3d at 1483; *see also Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 161-62.

As a corollary to its argument against seizure and sale, the Nation argues that Washington's implementation

of its administrative scheme, by which the Nation may participate in an administrative hearing and challenge the state's action, unduly interferes with the Nation's sovereignty. We also reject this argument.

As we have noted, the Nation's participation in the administrative proceeding is optional. The Nation may elect either to challenge the cigarette seizure in an administrative hearing or bring suit in Washington state court. *See Comenout*, 722 F.2d at 578. Without question, the practical effect of the seizure is that the Nation has to contest it in one state forum or the other, or suffer the loss of its cigarettes. But if the state's administrative seizure of the cigarettes is not an undue interference with the Nation's sovereign immunity (and under *Baker* it is not), the availability of a post-deprivation due process proceeding to challenge that action surely is not. We hold, therefore, that the Department did not unduly interfere with the Nation's sovereign immunity by affording it the opportunity to challenge the seizure in an administrative hearing. Neither the seizure and sale of the cigarettes, nor the implementation of Washington's administrative scheme to allow a challenge to the state's action, violated a federal right of the Nation.

4. Ongoing Violation of Federal Law

This case does not involve an ongoing violation of federal law. This aspect of the *Young* doctrine is inapplicable.

In sum, the district court did not abuse its discretion by denying the Nation's motion to amend its complaint to include ultra vires claims against individual state officers.

Such an amendment would have been futile. The state officers did not plainly act outside their statutory authority, a state forum exists to vindicate the Nation's federal interests, no federal right requires vindication by a federal court, and the case does not involve any ongoing violation of federal law.

C. Jurisdiction to Review the District Court's Remand Order

The Nation next argues the district court erred in remanding the administrative forfeiture proceeding. As a threshold matter, we must determine whether we have appellate jurisdiction to review the district court's remand order. Under 28 U.S.C. § 1447(d), "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

While section 1447(d) appears on its face to bar all review of remand orders, courts have consistently interpreted it as precluding review only of remands based on a timely raised defect in removal procedure or lack of subject matter jurisdiction. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996); *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915-16 (9th Cir. 1992). Remand orders based on a defect in removal procedure or lack of subject matter jurisdiction are immune from review even if the district court's order is erroneous. *See Krangel*, 968 F.2d at 916.

The district court in this case remanded the administrative proceeding after concluding that "the factors under [28 U.S.C.] § 1441 are not met since the administrative forfeiture proceeding is not a state court action and,

in any event, there is no original jurisdiction." Thus, the remand order was based on two alternative holdings, one for lack of a state court action and the other for lack of subject matter jurisdiction. As to the latter holding, the district court held that it lacked jurisdiction because "no federal statute applies to an action brought by a state against a piece of property found in the state that is deemed contraband according to state law."

This case is somewhat muddied by the district court's alternative holdings. A remand based only on the "lack of a state court action" would not be insulated from appellate review. On the other hand, a remand order based primarily on the lack of subject matter jurisdiction is insulated from review, even if the district court's jurisdictional determination is erroneous. *See Kunzi v. Pan American World Airways, Inc.*, 833 F.2d 1291, 1293-95 (9th Cir. 1987) (determining that remand order based mainly on jurisdictional grounds was nonreviewable). Here, the district court not only stated it lacked subject matter jurisdiction, it couched its alternative holding (no state court action) in jurisdictional language as well. We conclude that the court's jurisdictional concerns played a central enough role in its remand decision that its remand was primarily for lack of subject matter jurisdiction, and as a result we lack appellate jurisdiction to review the propriety of the remand order.

Alternatively, we conclude that the district court did not err in remanding the administrative proceeding because the Nation is not a defendant in that proceeding. The right to remove a case from state to federal court is vested exclusively in "the defendant or the defendants . . . " 28 U.S.C. § 1441(a). Federal law, not the

applicable state statute or even the pleadings in state court, determines who is a plaintiff and who is a defendant. *See Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580, 98 L. Ed. 317, 74 S. Ct. 290 (1954). In the present case, the Department seized the property and then notified the Nation of the seizure and intended forfeiture, thereby affording the Nation "a reasonable opportunity to be heard as to the claim or right." Wash. Rev. Code § 82.24.135(5). Because the nature of the administrative proceeding placed the Nation in the role of a quasi-plaintiff with the burden of proof of establishing a claim to the property (the same role the Nation would have if it chose to challenge the seizure in state court), the Nation was not a "defendant," and removal of the administrative proceeding was improper.

D. Return of Proceeds to the State

Because the cigarettes were "contraband subject to seizure and sale," Wash. Rev. Code § 82.24.250(4); *see also Baker*, 63 F.3d at 1483, the Department had the power not only to seize and sell the cigarettes but to retain the auction proceeds pending the outcome of any administrative forfeiture proceeding or state court action, depending on which forum the Nation chose if it decided to contest the seizure. The district court, therefore, properly ordered the auction proceeds returned to the state.

CONCLUSION

Because the Department is immunized from suit under the Eleventh Amendment, we AFFIRM the dismissal of the Nation's original action. We also AFFIRM

the district court's denial of leave to amend the Nation's complaint to include ultra vires claims against individual state officers. Such an amendment would have been futile. Because the district court remanded the removed administrative proceeding primarily for lack of subject matter jurisdiction, we lack appellate jurisdiction to review the remand order and therefore DISMISS that portion of the Nation's appeal. Alternatively, if we were to reach the merits of the district court's decision to remand the administrative proceeding, we would affirm the remand order because the Nation is not a "defendant" in that proceeding. Finally, we direct the district court to lift the stay of its order directing that the auction proceeds be disbursed to the Department.

AFFIRMED in part and DISMISSED in part.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

YAKAMA INDIAN NATION, Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	NO. CY-97-3012-RHW CY-97-3013-RHW **ORDER** (Filed Sept. 22, 1997)

Before the Court are Defendant's Motion to Dismiss cause number CY-97-3012 (Ct. Rec. 10), Plaintiff's Motion to Amend cause number CY-97-3012 (Ct. Rec. 18), Plaintiff's Motion to Dismiss cause number CY-97-3013 (Ct. Rec. 10), and Defendant's Motion to Dismiss and Remand cause number CY-97-3013 (Ct. Rec. 13). Oral argument was held on August 29, 1997. Leslie Weatherhead, Elizabeth Nason and Jack Fiander appeared on behalf of Plaintiff. Assistant Attorney General for the State of Washington John Barnes appeared on Behalf of Defendant. For the reasons explained below, Defendant's motions are granted and, correspondingly, Plaintiff's motions are denied.

BACKGROUND

The facts relevant to the motions before the Court are not in dispute. Washington state law taxes the sale, use,

consumption, handling, possession or distribution of all cigarettes. Wash. Rev. Code § 82.24.020. The State of Washington, Department of Revenue ("the Department") is charged with enforcing the tax and does so by requiring that all packages of cigarettes be affixed with a stamp indicating the tax has been paid. Wash. Rev. Code § 82.24.030. Indian tribes are permitted to possess unstamped cigarettes on state land if they provide the Department with notice that they are transporting unstamped cigarettes into the state. In the absence of such notice, any unstamped cigarettes are considered contraband and subject to seizure and sale. Wash. Rev. Code § 82.24.250.

On January 16, 1997, Washington State Patrol Trooper David W. Robinson performed a random paper check of a truck and trailer that had crossed the scales at station 54 on Highway I-82, near Plymouth, Washington. In response to the inspection, the driver produced a bill of lading indicating that he was carrying a load of cigarettes bound for the Yakama Indian Nation ("The Nation") in Toppenish, Washington. Trooper Robinson then checked the load securement of the truck and, in so doing, found individual cigarette packages that did not bear Washington State tax stamps. Trooper Robinson next contacted the Department of Revenue and was informed that it had not received notification of the transfer of unstamped cigarettes to the Nation. Trooper Robinson obtained a search warrant from the Benton County Superior Court and subsequently seized the load of cigarettes, inventoried them and stored them in a warehouse in Pasco, Washington.

The Department notified the Nation that the cigarettes had been seized pursuant to Wash. Rev. Code § 82.24.135. In response to this notification, Jack Fiander wrote a letter on behalf of the Nation, demanding the return of the cigarettes. The Department did not automatically release the cigarettes, but instead arranged an administrative hearing.

The Nation subsequently removed the administrative matter into federal court (CY-97-3013-RHW) and filed an action against the Department, seeking the return of the property and declaratory and injunctive relief (CY-97-3012-RHW). During the pendency of this action, the seized cigarettes were auctioned for $235,000. By stipulation of the parties, this Court ordered the proceeds from the auction to be paid over to the registry of the court (CY-97-3012-RHW and CY-97-3013-RHW Ct. Rec. 7).

ANALYSIS

The Nation's Complaint for Relief, CY-97-3012-RHW

1. The Department's Motion to Dismiss

The Department correctly claims that the Nation's complaint for return of the cigarette proceeds and declaratory and injunctive relief must be dismissed on the basis of the Eleventh Amendment.

A suit initiated in federal court that names a state as the defendant shall be dismissed unless the state has waived its sovereign immunity accorded by the Eleventh Amendment of the United States Constitution. *See Idaho v. Coeur d'Alene Tribe of Idaho,* 117 S.Ct. 2028 (1997); *Florida Department of State v. Treasure Salvors, Inc.,* 458 U.S. 670

(1982). Consent to suit is usually achieved by legislative waiver, but the case may be made that consent also can be established by a state voluntarily involving itself in a federal court action to the extent that the state's actions constitute an "unequivocal indication" of the state's consent to suit. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1991) (state's involvement in settlement proceedings indicates limited consent to suit in federal court).

The record lacks any basis from which the Nation could argue legislative waiver. Instead, the Nation apparently claims that the State of Washington has consented to suit by involving itself in federal court litigation and depositing the cigarette proceeds into the Court's register. This argument is not convincing. In its Answer to the Nation's Complaint filed on February 24, 1997, the Department of Revenue specifically cited sovereign immunity as an affirmative defense to suit. This occurred before the deposit of funds into the Court's registry. After the deposit of funds the Nation made a timely motion to dismiss based upon sovereign immunity. Thus, any consent that might be gleaned from the act of depositing the funds is, at best, equivocal and therefore insufficient.

2. The Nation's Motion to Amend

The Nation seeks to amend its complaint to include *ultra vires* claims against various state actors. Amendment under the Federal rules is quite liberal and should be granted unless "amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." *Martinez v. Newport Beach City*, 1997 WL

559716 at *9 (9th Cir. September 10, 1997). Despite the leniency of this standard, the Department is correct to point out that amendment would not cure the Nation's complaint of its problems with regard to sovereign immunity.

The Nation accurately states that Eleventh Amendment immunity does not bar suits against state officials for prospective relief. *See Ex parte Young*, 209 U.S. 123 (1908). At most, three possibilities exist for laying suit under this exception – when state officials are acting outside their statutory authority, when no state forum exists to vindicate federal interests, or in a case that calls for the interpretation of federal law. *See Coeur d'Alene Tribe*, 117 S.Ct. 2028. Here, the first two options are clearly unavailable. The Nation does not allege that any state agents were acting outside the scope of Washington law and, as the Department points out, Wash. Rev. Code § 82.24.135(5) provides a state forum for contesting the seizure. The Nation may, therefore, only succeed if it can establish that it seeks prospective relief against state officers based upon a violation of a federal right.

The Nation's argument along these lines is that by initiating the forfeiture proceeding underlying this action, state officials violated the Nation's sovereign immunity by attempting to compel the Nation to answer to a civil complaint without the Nation's consent. *Cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

The Nation's error lies in characterizing the forfeiture proceeding as an action against the Nation. As explained by the Supreme Court in *Treasure Salvors,* a sovereign's interests are not implicated by an *in rem* action unless the *in rem* proceedings appear to be an underhanded ploy to avoid sovereign immunity and get at the sovereign's coffers. 458 U.S. at 697. The Nation has provided no indication that the Department's forfeiture proceedings were motivated by any intent other than the control of contraband materials. To the contrary, the Supreme Court for the United States has specifically approved of the off-reservation seizure of unstamped cigarettes as a manner in which the states may enforce their tax laws. *See Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 161-62 (1980). *See also Potawatomi Indian Tribe,* 498 U.S. at 514. The Nation fails to provide any authority as to why the Department's forfeiture procedures are not in compliance with the provisions of *Colville* and *Patawatomi.*

The Removal Action, CY-97-3013-RHW

Under 28 U.S.C. § 1441, any action brought in state court may be removed to federal court if the federal court would have had original jurisdiction. In this case the factors under § 1441 are not met since the administrative forfeiture proceeding is not a state court action and, in any event, there is no original federal jurisdiction.

Over a century ago, the Supreme Court held that an action considered by a body designated by the state as a "court" may not be removable if, in fact, the entity did not function as a judicial body. *See Upshur County v. Rich,*

135 U.S. 467 (1890) (despite a state's designation of a board of commissioners as a "county court," proceedings under the board are not removable because the board does not have judicial powers). This holding has led several federal courts to reason conversely that removal may be had from forums not labeled as state courts if the forum is the functional equivalent of a court. In determining whether a decision-making body is a "state court" for the purposes of removal, the standard has been to look at the functions, powers, and procedures of the state proceeding along with the respective state and federal interests in the subject matter under adjudication. *See, e.g., Floeter v. C.W. Transport, Inc.*, 597 F.2d 1100 (7th Cir. 1979). *See also* 14A Wright & Miller, Federal Practice and Procedure § 3721 (2d. ed. 1985).

The Department correctly points out that the administrative proceeding under Wash. Rev. Code § 82.24-135 is not the functional equivalent of a judicial proceeding. The forfeiture proceeding, unlike a state court action, is not initiated by a complaint. Instead, notice is sent out to all persons who might have a property interest in the seized goods. Should a party claim interest in the seized goods, the director of the Department of Revenue or the director's designee, not a judge, will conduct a hearing on the matter. At the hearing, the rules of evidence apply only in part and the party opposing seizure carries the burden of proof. Wash. Rev. Code § 82.24.135; Wash. Admin. Code § 458-20-10001. If a party claiming interest in the property would prefer a judicial rather than administrative hearing on the matter, Washington law affords the opportunity to bring an action for return of the seized goods in the superior court of the county in which the seizure took

place. Wash. Rev. Code § 92.24.135(5). In terms of federal versus state court interests, Washington's interests in enforcing its tax laws and removing contraband goods from its lands are greater than any federal interest in the suit. *Cf. Comenout v. State of Wash.*, 722 F.2d 574 (9th Cir. 1983) (holding that the Tax Injunction Act bars suits by individual tribal members against the state and citing the concern that allowing suit would improperly interfere with the state's tax enforcement scheme).

Even if the Department hearing could be construed as a state court proceeding, removal is inappropriate due to the want of original federal jurisdiction. Because this action is one between the State of Washington and a bundle of property, not the Nation, it could not have been originally brought as a federal action. No federal statute applies to an action brought by a state against a piece of property found in the state that is deemed contraband according to state law.

Based on the foregoing analysis, **IT IS HEREBY ORDERED**:

1. Defendant's Motion to Dismiss **(CY-97-3012-RHW Ct. Rec. 10)** is **GRANTED**.

2. Plaintiff's Motion to Amend **(CY-97-3012-RHW Ct. Rec. 18)** is **DENIED**.

3. Plaintiff's Motion to Dismiss **(CY-97-3013-RHW Ct. Rec. 10)** is **DENIED**.

4. Defendant's Motion to Remand **(CY-97-3013-RHW Ct. Rec. 13)** is **GRANTED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order, provide copies to counsel,

and remand this case to the State of Washington, Department of Revenue along with a remission of the funds in this Court's registry.

DATED this 22 day of September, 1997.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

YAKAMA INDIAN NATION, Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	NO. CY-97-3012-RHW CY-97-3013-RHW **ORDER DENYING MOTION FOR RECONSIDERATION AND STAYING DISBURSEMENT OF FUNDS** (Filed Nov. 20, 1997)

These cases both involved challenges by Plaintiff Yakama Indian Nation's ("the Nation") to the Defendant State of Washington, Department of Revenue's ("the Department") off-reservation seizure of unstamped, unregistered cigarettes. On September 22, 1997, the Court issued an Order dismissing the Nation's claims against the Department and remanding the Department's forfeiture action. On October 2, 1997, the Nation filed a Motion for Reconsideration (Ct. Rec. 34; 33). A hearing was held on the Nation's motion on November 7, 1997. Leslie Weatherhead, Jack Fiander and Jody McCormick appeared on behalf of the Nation. John Barnes appeared on behalf of the Department.

For the reasons explained below, the Nation's motion for reconsideration is denied. However, because the claims raised by this action could be debatable among reasonable jurists, disbursement of the cigarette funds,

currently held in the Court's registry, shall be stayed pending appeal, should one follow.

DISCUSSION

The Nation filed its motion for reconsideration ten days after this Court's entry of final judgment. Accordingly, the Court construes the Nation's motion as a timely motion to alter or amend judgment under Fed. R. Civ. P. 59(e).

The Nation's motion raises the following five arguments: (1) the Court has jurisdiction to order the appropriate disbursal of the cigarette funds in this case since the Department has deposited the funds into the Court's registry; (2) *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) does not apply to the situation at bar; (3) *Washington v. Confederated Tribes of the Colville Indian Nation*, 447 U.S. 134 (1980) and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) only permit off-reservation seizures of cigarettes when the owner of the cigarettes is a taxable entity (i.e. a cigarette supplier instead of a tribe); (4) if the Department is permitted to forfeit cigarettes, it may only retain an appropriate tax, rather than the entire value of the cigarettes; and (5) if the Court does not grant relief, the funds in the Court's registry should not be released. Having considered each of these arguments, the Court concludes that its original disposition was appropriate.

Whether the Court Should Order Disbursement of the Funds in its Registry According to a Determination of a Ownership

Money deposited in the Court's registry cannot "be withdrawn except by order of the court." 28 U.S.C. § 2042. On the basis of this provision, the Nation argues that the Court must adjudicate ownership of such funds before release can issue. The Nation is incorrect. Although it is true that when the Court reaches a final decision, it may apportion withheld funds to cover liens on prevailing claims such as attorneys fees, *see, e.g., Wood v. Motorola, Inc.*, 587 F. Supp. 531 (D. Haw. 1984), this case is distinct since there has not been a final judgment regarding the funds in question. Instead, the Court decided that the Nation's removal action was improper and remanded the case to the Department for a determination of forfeiture of the cigarette proceeds. If the Court were to determine ownership of the funds, then the remanded action would be stripped of its entire purpose. A holding in this manner would be contradictory – at once proclaiming that the state is the proper forum for the determination of forfeiture and at the same time determining the actual issue of forfeiture in the federal forum.

The Application of *Treasure Salvors, Colville,* and *Potawatomi*

The nation's second and third arguments claim that the order of dismissal misapplied the Supreme Court's decision in *Florida Dept. of State v. Treasure Salvors, Washington v. Confederated Tribes of the Colville Indian Nation,* and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi*

Indian Tribe of Oklahoma. Although the Nation's briefing separates these lines of cases, the Court's reliance on them is intertwined. Consequently, they must be discussed simultaneously.

The Nation argues that the Supreme Court's discussion of *in rem* proceedings in *Treasure Salvors* does not apply to the case because, unlike the State of Florida in *Treasure Salvors*, the Nation in this case has a cognizable claim to the underlying *res*. Although the Supreme Court's decision in *Treasure Salvors* recognized that Florida had no valid claim to the property in question and, consequently, could not complain that its sovereign immunity was implicated, this reasoning was based on the theory that sovereign immunity is not implicated when an action does not name the sovereign as a party and the sovereign's coffers are not put into jeopardy. *See Ex parte Young*, 209 U.S. 123 (1908). The Court in *Treasure Salvors* made this reasoning clear in the final section of its opinion. In distinguishing the case at hand from *In re New York* (I), 256 U.S. 490 (1921) and *In re New York* (II), 256 U.S. 503 (1921), the Court explained that in *In re New York*, sovereign immunity applied to an action *in rem* because the proceeding was, in effect, an impermissible *in personam* action against the state. *Treasure Salvors*, 458 U.S. at 698-99.

Here, the Department's actions cannot be characterized in this manner. The Department was not trying to reach the Nation's proceeds. Instead, by seizing the off-reservation cigarettes, it was trying to keep its land clear of contraband and enforce its tax laws, an effort the Supreme Court validated in *Colville*.

In *Colville*, the Supreme Court addressed the State of Washington's cigarette tax enforcement practices and concluded that the state could seize off-registration unstamped cigarettes. The Court reached this conclusion by determining that tribal rights to independence must be balanced against the needs of the states to enforce their tax laws, and that off-reservation seizures constitute a minimal burden on tribes when a tribe has refused to comply with a valid tax obligation. 498 U.S. at 161-62.[1] Here, the Nation does not contend that notification of intent to transport unstamped cigarettes is not a valid tax obligation and the Court does not construe it as such.[2] Instead, the Nation argues that *Colville* is limited in application to seizures of cigarettes that are owned by non-tribal wholesalers.

Colville is not limited in this manner. The Supreme Court's decision in *Colville* recognized that the burden of seizure would fall on Indian tribes, not non-tribal

---

[1] The balancing that must occur between the state's taxing interests and the Nation's sovereignty differentiates this case from a situation where a private party attempts to bring an *in rem* proceeding against a tribe in a non-tribal court. *Cf. In re Greene*, 980 F.2d 590, 598 (9th Cir. 1992) (holding that sovereign immunity protects the Yakama Indian Nation from defending its property interests in a bankruptcy trustee suit, but explaining that cases involving conflicting state and tribal claims "require a different analysis.")

[2] The Ninth Circuit approved of Washington's cigarette registration provision as a minimal burden on Indian sovereignty in *United States v. Baker*, 63 F.3d 1478, 1489 (9th Cir. 1995).

cigarette suppliers.[3] Furthermore, in *Potawatami*, the Supreme Court cited *Colville* for the proposition that states can impose a tax burden on "cigarette wholesalers . . . by seizing unstamped cigarettes off of the reservation." *Potawatami*, 498 U.S. at 514. In *Colville*, the Yakama Nation was a party and was defined as a cigarette wholesaler, purchasing cigarettes from out-of-state dealers and then selling them to licensed retailers. *Colville*, 447 U.S. 2077. Reading *Potawatami* and *Colville* together, it is apparent that the Supreme Court intended to permit off-reservation seizures of cigarettes owned by tribal wholesalers.

Whether the State of Washington May Forfeit the Entire Value of the Cigarettes

In its briefing, the Nation argues that even if the State of Washington can seize unregistered cigarettes that do not bear tax stamps, the state nevertheless may not retain the value of seized goods. According to the Nation, the most the State can reasonably do is withhold the amount owing for any unpaid taxes and release the balance of the property to the Nation. At oral argument, the Nation modified this argument to state that Washington's ability to seize cigarettes is a right without a remedy in cases, such as this, where there is no tax to collect. Although the state may be able to seize off-reservation cigarettes that

---

[3] The Court understands *Colville* and other Supreme Court jurisprudence to hold that while Indian tribes may be burdened by tax schemes, they may not be taxed directly. *See Colville*, 447 U.S. at 151; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.15 (1980).

are not in compliance with state tax laws as contemplated by *Colville*, counsel argued that the state may not apportion ownership of the cigarettes; otherwise, it would be initiating legal proceedings against an Indian tribe, as prohibited by *Potawatami*.

While questionable, the Nation's argument is not without authority. In *Potawatami*, the Supreme Court explained that while states could require Indian tribes and tribal members to assist in the collection of taxes on cigarettes sold to non-tribal members, a state could not enforce this right by way of a legal proceeding against a tribe. The Supreme Court recognized that the right of states to require cooperation of Indian tribes is, in many ways, a "right without any remedy" since sovereign immunity protects tribes from being hauled into a non-tribal court for non-compliance. *See Potawatami*, 498 U.S. at 514.

Although the Supreme Court has recognized that the law is somewhat illogical in his regard, the Court also stated that states can operate under various "legal fictions" to require enforcement against a tribe where direct suit is impossible. For instance, a state may file an *ultra vires* action against tribal officials under the theory of *Ex parte Young*; it may tax non-tribal wholesalers selling cigarettes to Indian tribes, despite the fact that tribes will bear the burden of such taxes by paying higher taxes; and it may seize unstamped cigarettes off of the reservation. *Id.* The Court understands the Supreme Court's list of exceptions to be what it purports to be – a series of remedies that do not infringe upon tribal sovereignty. Once an Indian tribe has violated a reasonable state taxation regulation and the state has seized non-complying cigarettes

off of the reservation, the goods become contraband. *See United States v. Baker*, 63 F.3d 1478, 1488 (9th Cir. 1995). The State is then entitled to process the offending cigarettes as contraband, subject to compliance with the ordinary demands of due process. The Nation does not complain that Washington's forfeiture scheme violates due process. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).[4] Accordingly, no attack can be laid.[5]

Whether the Court Should Release the Cigarette Proceeds Currently Deposited in the Court Registry Pending Appeal

At oral argument, the Department recognized that it would suffer no real prejudice by this Court's staying disbursement of the cigarette proceeds currently in the Court's registry to the Department pending appeal. Accordingly, given the significance of the legal issues raised in this case, and the fact that the Nation's legal arguments are based, at least in part, on the fact that the Court currently has the authority to order disbursement of the funds in question, the Court agrees with the Nation

---

[4] Furthermore, the Nation would not have authority to attack the due process of Washington's forfeiture practice since the proceedings have yet to be completed.

[5] The Supreme Court jurisprudence in this area of state tax laws has been criticized as overly subjective. *See e.g.*, David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Calif. L. Rev. 1573 (1996). However, given that the Supreme Court has spoken on the seizure issue, the Nation's complaints along these lines are beyond the authority of this Court.

that the disbursement of the proceeds should be stayed pending the Nation's anticipated appeal.

On the basis of the foregoing analysis, **IT IS HEREBY ORDERED**:

1. Plaintiff's Motion for Reconsideration **(Ct. Rec. CY-97-3012 #34; CY-97-3013 #33)** is **DENIED**.

2. Defendant's Motion for Order Extending Time **(Ct. Rec. CY-97-3012 #37; CY-97-3013 #36)** and Motion to Expedite **(Ct. Rec. CY-97-3012 # 38; CY-97-3013 #37)** are **GRANTED**.

3. Disbursement of the funds currently held in the Court's registry shall be **STAYED, pending further order of the Court.**

IT IS SO ORDERED. The District Court Executive is directed to enter this order, provide copies to counsel, and close the file in this matter.

DATED this 20 day of November, 1997.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Court

ELIZABETH F. NASON
Yakama Indian Nation
Office of Legal Counsel
P.O. Box 624
Toppenish, WA 98948
(509)865-7268

JACK W. FIANDER
Attorney at Law
P.O. Box 624
(509)874-1156

LESLIE R. WEATHERHEAD
JODY M. MCCORMICK
Witherspoon, Kelley, Davenport & Toole
1100 U. S. Bank Building
Spokane, WA 99201
(509)624-5265

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

YAKAMA INDIAN NATION, Plaintiff, vs. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	)	NO. CY-97-3012 RHW COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Filed Feb. 6, 1997)

COMES NOW plaintiff, by and through it attorneys, and for a claim for relief against defendant, complain and allege as follows:

I.

Plaintiff, YAKAMA INDIAN NATION, is a federally recognized Indian tribe with a governing body recognized by the Secretary of Interior, located geographically within the state of Washington.

II.

Defendant, STATE OF WASHINGTON, DEPARTMENT OF REVENUE, is a Washington state administrative agency.

III.

Original jurisdiction exists in this court under 28 U.S.C. § 1362 as this is a civil action brought by a federally recognized Indian Nation. Jurisdiction further exists in this court pursuant to 28 U.S.C. § 1331, as this case involves a federal question.

IV.

This Court may grant declaratory relief, pursuant to 28 U.S.C. §2207, as this action involves an actual controversy between the parties.

V.

On January 16, 1997, defendant seized plaintiff's property. Plaintiff requested release of the seized property by letter dated January 20, 1997. On about January 23, 1997, plaintiff was notified that its remedy to prevent forfeiture of the goods pursuant to a state adjudicative

proceeding. Defendant notified plaintiff that a state adjudicative proceeding was being instituted before an Administrative Tribunal of the Department of Revenue. Plaintiff was subsequently notified that the matter was set for hearing before an Administrative Law judge. A true copy of the Notice Seizure and Sale of Contraband Goods and plaintiff's letter is attached hereto as Exhibits "A" and "B".

VI.

As plaintiff is a federally recognized Indian Tribe, defendant does not have jurisdiction over plaintiff and may not adjudicate the rights and interests of a sovereign nation.

WHEREFORE, Plaintiff prays that this Court:

A. Declare that defendant, the State of Washington and its courts and tribunals, cannot exercise jurisdiction over a sovereign nation;

B. Declare that plaintiff is immune from suit by defendant;

C. Enjoin defendant from compromising plaintiff's sovereignty and from continuing with the defendant's adjudicative proceeding; and

D. Require defendant to return plaintiff's property, or its proceeds.

E. Grant such relief as is just and equitable.

DATED this 6th day of February, 1997.

Respectfully submitted,

/s/ Leslie R. Weatherhead for
ELIZABETH F. NASON
Yakama Indian Nation

/s/ Leslie R. Weatherhead for
JACK W. FIANDER
Attorney at Law

/s/ Leslie R. Weatherhead
LESLIE R. WEATHERHEAD
JODY M. McCORMICK
Witherspoon, Kelley,
Davenport & Toole P.S.

John S. Barnes
Assistant Attorney General
Revenue Division
400 General Admin. Bldg.
PO Box 40123
Olympia, WA 98504-0123

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

YAKAMA INDIAN NATION, Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	)	NO. CY-97-3012 RHW DEFENDANT'S ANSWER

Defendant State of Washington Department of Revenue answers the complaint as follows:

I. Admit

II. Admit

III. Defendant admits jurisdiction exists in this court under 28 U.S.C. § 1362 as this is a civil action brought by a federally recognized Indian Nation. Defendant denies jurisdiction further exists in this court pursuant to 28 U.S.C. § 1331.

IV. Defendant denies this Court may grant declaratory relief pursuant to 28 U.S.C. § 2207.

V. Admit.

VI. Defendant admits Plaintiff is a federally recognized Indian Tribe, but denies Defendant does not have jurisdiction over the Plaintiff to adjudicate the rights to the seized cigarettes.

First Affirmative Defense

1. The federal court lacks jurisdiction over Defendant. The Defendant has not consented to suit nor waived its eleventh amendment sovereign immunity rights.

Wherefore, Defendant prays for the following relief:

1. An order of this Court dismissing Plaintiff's suit.

2. An order directing Plaintiff to pay Defendant's costs and reasonable attorney's fees.

3. For such other and further relief as the court deems just and equitable.

DATED this 20th day of February, 1997.

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

By /s/ John S. Barnes
John S. Barnes, WSB# 19657
Assistant Attorney General
Department of Revenue
400 Gen. Admin. Bldg.
PO Box 40123
Olympia, WA 98504
(360) 753-5528

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YAKAMA INDIAN NATION, Plaintiff-Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant-Appellee.	No. 98-35068 D.C. No. CV-97-03012-RHW CV-97-03013-RHW ORDER (Filed Jul. 13, 1999)

Before: PREGERSON and THOMPSON, Circuit Judges, and MOSKOWITZ, District Judge.[1]

The panel has voted to deny appellant's petition for rehearing. Judge Pregerson has voted to reject the suggestion for rehearing en banc, and Judges Thompson and Moskowitz recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

---

[1] The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

TITLE 82. EXCISE TAXES
CHAPTER 82.24. TAX ON CIGARETTES

Rev. Code Wash. (ARCW) § 82.01.060 (1999)

§ 82.01.060. Director – Powers and duties – Rule-making authority

The director of revenue, hereinafter in chapter 26, Laws of 1967 ex. sess. referred to as the director, through the department of revenue, hereinafter in chapter 26, Laws of 1967 ex. sess. referred to as the department, shall:

(1) Assess and collect all taxes and administer all programs relating to taxes which are the responsibility of the tax commission at the time chapter 26, Laws of 1967 ex. sess. takes effect or which the legislature may hereafter make the responsibility of the director or of the department;

(2) Make, adopt and publish such rules as he or she may deem necessary or desirable to carry out the powers and duties imposed upon him or her or the department by the legislature: PROVIDED, That the director may not adopt rules after July 23, 1995, that are based solely on a section of law stating a statue's intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt any rule;

(3) Rules adopted by the tax commission before July 23, 1995, shall remain in force until such time as they may be revised or rescinded by the director;

(4) Provide by general regulations for an adequate system of departmental review of the actions of the

department or of its officers and employees in the assessment or collection of taxes;

(5) Maintain a tax research section with sufficient technical, clerical and other employees to conduct constant observation and investigation of the effectiveness and adequacy of the revenue laws of this state and of the sister states in order to assist the governor, the legislature and the director in estimation of revenue, analysis of tax measures, and determination of the administrative feasibility of proposed tax legislation and allied problems;

(6) Recommend to the governor such amendments, changes in, and modifications of the revenue laws as seem proper and requisite to remedy injustice and irregularities in taxation, and to facilitate the assessment and collection of taxes in the most economical manner.

Rev. Code Wash. (ARCW) § 82.24.020 (1999)

§ 82.24.020. Tax imposed – Additional taxes for specific purposes – Absorption of tax – Possession defined

(1) There is levied and there shall be collected as provided in their chapter, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes, in an amount equal to the rate of eleven and one-half mills per cigarette.

(2) An additional tax is imposed upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to the rate of five and one-

fourth mills per cigarette. All revenues collected during any month from this additional tax shall be deposited in the violence reduction and drug enforcement account under RCW 69.50.520 by the twenty-fifth day of the following month.

(3) An additional tax is imposed upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to the rate of ten mills per cigarette through June 30, 1994, eleven and one-fourth mills per cigarette for the period July 1, 1994, through June 30, 1995, twenty mills per cigarette for the period July 1, 1995, through June 30, 1996, and twenty and one-half mills per cigarette thereafter. All revenues collected during any month from this additional tax shall be deposited in the health services account created under RCW 43.72.900 by the twenty-fifth day of the following month.

(4) Wholesalers and retailers subject to the payment of this tax may, if they wish, absorb one-half mill per cigarette of the tax and not pass it on to purchasers without being in violation of this section or any other act relating to the sale or taxation of cigarettes.

(5) For purposes of this chapter, "possession" shall mean both (a) physical possession by the purchaser and, (b) when cigarettes are being transported to or held for the purchaser or his or her designee by a person other than the purchaser, constructive possession by the purchaser or his or her designee, which constructive possession shall be deemed to occur at the location of the cigarettes being so transported or held.

Rev. Code Wash. (ARCW) § 82.24.030 (1999)

§ 82.24.030. Stamps

(1) In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department. The stamps must be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid or whether an exemption from the tax applies.

(2) Except as otherwise provided in this chapter, every person shall cause to be affixed on every package of cigarettes, stamps of an amount equaling the tax due thereon or stamps identifying the cigarettes as exempt before he or she sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: PROVIDED, That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

Rev. Code Wash. (ARCW) § 82.24.130 (1999)

§ 82.24.130. Seizure and forfeiture

(1) The following are subject to seizure and forfeiture:

(a) Subject to RCW 82.24.250, any articles taxed in this chapter that are found at any point within this state, which articles are held, owned, or possessed by any person, and that do not have the stamps affixed to the packages or containers.

(b) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in (a) of this subsection, except:

(i) A conveyance used by any person as a common or contract carrier having in actual possession invoices or delivery tickets showing the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and brands of the cigarettes transported, unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;

(ii) A conveyance subject to forfeiture under this section by reason of any act or omission of which the owner thereof establishes to have been committed or omitted without his or her knowledge or consent;

(iii) A conveyance encumbered by a bona fide security interest if the secured party neither had knowledge of nor consented to the act or omission.

(c) Any vending machine used for the purpose of violating the provisions of this chapter,

(2) Property subject to forfeiture under this chapter may be seized by any agent of the department authorized to collect taxes, any enforcement officer of the board, or

law enforcement officer of this state upon process issued by any superior court or district court having jurisdiction over the property. Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant; or

(b) The department, the board, or the law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of this chapter and exigent circumstances exist making procurement of a search warrant impracticable.

(3) Notwithstanding the foregoing provisions of this section, articles taxed in this chapter which are in the possession of a wholesaler or retailer, licensed under Washington state law, for a period of time necessary to affix the stamps after receipt of the articles, shall not be considered contraband.

Rev. Code Wash. (ARCW) § 82.24.135 (1999)

§ 82.24.135. Forfeiture procedure

In all cases of seizure of any property made subject to forfeiture under this chapter the department or the board shall proceed as follows:

(1) Forfeiture shall be deemed to have commenced by the seizure. Notice of seizure shall be given to the department or the board immediately if the seizure is

made by someone other than an agent of the department or the board authorized to collect taxes.

(2) Upon notification or seizure by the department or the board or upon receipt of property subject to forfeiture under this chapter from any other person, the department or the board shall list and particularly describe the property seized in duplicate and have the property appraised by a qualified person not employed by the department or the board or acting as its agent. Listing and appraisement of the property shall be properly attested by the department or the board and the appraiser, who shall be allowed a reasonable appraisal fee. No appraisal is required if the property seized is judged by the department or the board to be less than one hundred dollars in value.

(3) The department or the board shall cause notice to be served within five days following the seizure or notification to the department or the board of the seizure on the owner of the property seized, if known, on the person in charge thereof, and on any other person having any known right or interest therein, of the seizure and intended forfeiture of the seized property. The notice may be served by any method authorized by law or court rule including but not limited to service by mail. If service is by mail it shall be by both certified mail with return receipt requested and regular mail. Service by mail shall be deemed complete upon mailing within the five-day period following the seizure or notification of the seizure to the department or the board.

(4) If no person notifies the department or the board in writing of the person's claim of ownership or

right to possession of the items seized within fifteen days of the date of the notice of seizure, the item seized shall be considered forfeited.

(5) If any person notifies the department or the board, in writing, of the person's claim of ownership or right to possession of the items seized within fifteen days of the date of the notice of seizure, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The hearing shall be before the director or the director's designee or the board or the board's designee, except that any person asserting a claim or right may bring an action for return of the seized items in the superior court of the county in which such property was seized, if the aggregate value of the article or articles involved is more than five hundred dollars. A hearing and any appeal therefrom shall be in accordance with chapter 34.05 RCW. The burden of proof by a preponderance of the evidence shall be upon the person claiming to be the lawful owner or the person claiming to have the lawful right to possession of the items seized. The department or the board shall promptly return the article or articles to the claimant upon a determination that the claimant is the present lawful owner or is lawfully entitled to possession thereof of the items seized.

Rev. Code Wash. (ARCW) § 82.24.145 (1999)

§ 82.24.145. Forfeited property – Retention or sale – Use of sale proceeds

When property is forfeited under this chapter the department may:

(1) Retain the property or any part thereof for official use or upon application by any law enforcement agency of this state, another state, or the District of Columbia, or of the United States for the exclusive use of enforcing the provisions of this chapter or the laws of any other state or the District of Columbia or of the United States.

(2) Sell the property at public auction to the highest bidder after due advertisement, but the department before delivering any of the goods so seized shall require the person to whom the property is sold to affix the proper amount of stamps. The proceeds of the sale and all moneys forfeited under this chapter shall be first applied to the payment of all proper expenses of any investigation leading to the seizure and of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs. The balance of the proceeds and all moneys shall be deposited in the general fund of the state. Proper expenses of investigation includes costs incurred by any law enforcement agency or any federal, state, or local agency.

Rev. Code Wash. (ARCW) § 82.24.250 (1999)

§ 82.24.250. Transportation of unstamped cigarettes – Invoices and delivery tickets required – Stop and inspect

(1) No person other than: (a) A licensed wholesaler in the wholesaler's own vehicle; or (b) a person who has given notice to the board in advance of the commencement of transportation shall transport or cause to be transported in this state cigarettes not having the stamps affixed to the packages or containers.

(2) When transporting unstamped cigarettes, such persons shall have in their actual possession or cause to have in the actual possession of those persons transporting such cigarettes on their behalf invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported.

(3) If the cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state.

(4) In the absence of the notice of transportation required by this section or in the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not a person authorized by chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

(5) Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.

(6) In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

(7) For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" means:

(a) A wholesaler or retailer, licensed under Washington state law;

(b) The United States or an agency thereof; and

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made

payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

Rev. Code Wash. (ARCW) § 82.24.260 (1999)

§ 82.24.260. Selling or disposal of unstamped cigarettes – Person to pay and remit tax or affix stamps – Liability

(1) Other than:

(a) A person required to be licensed under this chapter;

(b) A federal instrumentality with respect to sales to authorized military personnel; or

(c) An Indian tribal organization with respect to sales to enrolled members of the tribe.

a person who is in lawful possession of unstamped cigarettes and who intends to sell or otherwise dispose of the cigarettes shall pay, or satisfy its precollection obligation that is imposed by this chapter, the tax required by this chapter by remitting the tax or causing stamps to be affixed in the manner provided in rules adopted by the department.

(2) When stamps are required to be affixed, the person may deduct from the tax collected the compensation allowable under this chapter. The remittance or the affixing of stamps shall, in the case of cigarettes obtained in the manner set forth in RCW 82.24.250(7)(c), be made

at the same time and manner as required in RCW 82.24.250(7)(c).

(3) This section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax imposed by this chapter.

(4) Nothing in this section shall relieve a wholesaler or a retailer from the requirements of affixing stamps pursuant to RCW 82.24.040 and 82.24.050.

APPENDIX E

[SEAL]

STATE OF WASHINGTON

DEPARTMENT OF REVENUE

[Address Omitted In Printing]

January 17, 1997

BOB D HOUSE
MONTREAL PACIFIC INC
1325 E DEWEY
SAPULPA OK 74066

Subject: Notice Seizure and Sale of Contraband Goods and Inventory of Confiscated Cigarettes

Dear Mr. House:

Please find enclosed a "NOTICE SEIZURE AND SALE OF CONTRABAND GOODS" and an "INVENTORY OF CONFISCATED CIGARETTES" for the cigarette inventory, seized by the Department of Revenue on Thursday, January 17, 1997 from your tractor-trailer combination driven by Mr. Loyd Williams. The search warrant and seizure was executed at the Washington State Patrol's Commercial Vehicle Enforcement point of entry in Plymouth, Washington.

I have enclosed copies of Revised Code of Washington 82.24.120, 130, 135, and 250 for your information. **You have 15 days from the date of this notice to file a written claim of ownership or right to possession of the cigarettes seized from you per RCW 82.241.35(5).**

If you have questions, you may call me at (360) 753-5564.

Sincerely,

/s/ Doyle McMinn
Doyle McMinn
Miscellaneous Tax Specialist
Washington State Department of Revenue

Enclosures

cc: file
Yakama Indian Nation, PO Box 151 Fort Road, Toppenish, Washington
Jack Fiander, Yakama Commerce Association, c/o Yakama Indian Nation, PO Box 151 Fort Road, Toppenish, Washington

[SEAL]

STATE OF WASHINGTON

DEPARTMENT OF REVENUE

[Address Omitted In Printing]

January 17, 1997

THE HONORABLE ROSS SOCKZEHIGH CHAIR
YAKAMA INDIAN NATION TRIBAL COUNCIL
PO BOX 151 FORT ROAD
TOPPENISH WA 98948

Dear Chairman Sockzehigh:

Please find enclosed a copy of the "NOTICE SEIZURE AND SALE OF CONTRABAND GOODS" sent to Bob D. House of Montreal-Pacific Inc. The department executed a search warrant on Mr. House's tractor-trailer combination at the Plymouth, Washington point of entry weigh station and confiscated the enclosed inventory of cigarettes. Bill of Lading information indicated a destination of Toppenish, Washington and purchasers of several Yakama Indian Nation accounts.

If the Yakama Indian Nation plans to file a written claim on this seizure, you have fifteen days from the date of the notice to file.

If you have questions, you may call me at (360) 753-5564

Sincerely,

/s/ Doyle McMinn
Doyle McMinn
Miscellaneous Tax Specialist
Washington State Department of Revenue

Enclosures

[LOGO]

[Address Omitted In Printing]

NOTICE

SEIZURE AND SALE OF CONTRABAND GOODS

County of Benton

Notice is hereby given of the seizure and intended forfeiture by the State of Washington Department of Revenue, pursuant to Chapter 82.24 Revised Code of Washington, of the hereinafter described contraband goods which were located at Washington State Patrol's Point of Entry-Plymouth, Washington in the city of Plymouth, county of Benton, and were used for the purpose of violating the provisions of said chapter. I have seized the following described property, to-wit:

26,381 cartons of unstamped contraband cigarettes.

The above described contraband goods seized on the 16TH day of January, 1997 from Bob D. House/Montreal-Pacific, Inc. In whose place of residence is N/A and whose place of business is 1325 E Dewey, Sapulpa, OK 74066 and Certificate of Registration number is N/A.

Any person claiming the above described contraband goods is required to notify the State of Washington Department of Revenue and make such claim in writing within fifteen days from the date of this notice under the provisions of Chapter 82.24.135 Revised Code of Washington.

Notice is hereby given that after forfeiture has commenced, an agent of the Department of Revenue will sell

all of the above described contraband goods at public auction, after due advertisement, to the highest and best bidder, pursuant to the provisions of said chapter. The State of Washington reserves the right to reject any and all bids or retain property for official use.

Given under my hand this 17th day of January, 1997

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

By /s/ Doyle McMinn
(Authorized Signature)

Olympia, Washington
(City)

For information call:

(360) 753-5564

( )

Yakima Seizure 1-16-97

Yakima Seizure 1-16-97			
Supplier:			
Tobacco Warehouse			
PO Box 88, Galena KS 66739			
Purchaser:			
Yakima Indian Nation			
PO Box 151, Fort Road, Toppenish WA			
Invoice Nbr		Cartons	Value
1812-14		146	$ 1,574.26
1808-37		19,163	$ 199,950.70
1803-36		1,674	$ 17,327.10
1811-27		1,696	$ 14,478.75
1801-37		1,980	$ 23,228.00
1812-13		124	$ 1,308.60
1801-38		270	$ 2,977.50
1802-37		1,470	$ 16,318.50
Totals		26,381	$277,158.40
Cig Tax Value			$217,643.00
Retail Value (approx.)			$319,841.00
Retail Sales Tax (6%)			341,365.00

PRELIMINARY INVENTORY
JANUARY 16, 1997

ABOVE IS A PRELIMINARY INVENTORY BASED ON THE INVOICES YOU PROVIDED. YOU HAVE ADVISED ALL OF THESE ITEMS ARE ON BOARD AND NO STOPS TO UNLOAD HAVE BEEN MADE. A PHYSICAL INVENTORY WILL BE MADE SUBSEQUENT TO SEARCH AND A COPY WILL BE SENT TO YOU AT AN ADDRESS YOU MAY PROVIDE.

/s/ Loyd Williams
COPY RECEIVED BY

/s/ Bob House/Montreal-Pacific Inc.
COPY DELIVERED TO 1325 E Dewey
Sapulpa, OK 74066

BEST AVAILABLE COPY

[SEAL]

STATE OF WASHINGTON

DEPARTMENT OF REVENUE

[Address Omitted In Printing]

February 7, 1997

VIA FAX NO. (509) 874-1156 & 1ST CLASS MAIL

Mr. Jack Fiander
Post Office 624
White Swan, Washington 98952

Mr. John Barnes
Assistant Attorney General
General Administration Building
Post Office Box 40123
Olympia, Washington 98504-0123

Re: Yakima Indian Nation
Docket No. 9701-004
Cigarette Seizure/Forfeiture

Gentlemen:

In accordance with Ch. 82.24 RCW the above-referenced matter has been assigned to me for hearing. In accordance with your request, the hearing scheduled for Friday, February 14, 1997, will be postponed until further notice from you. In the meantime, should you have any questions please feel free to contact me at (360) 586-0372.

Sincerely,

/s/ David H. Prather
David H. Prather
Manager, Policy & Operations
Interpretation and Appeals Division
Presiding Officer

DHP:gsd

[SEAL]

STATE OF WASHINGTON

DEPARTMENT OF REVENUE

[Address Omitted In Printing]

February 14, 1997

Jack W. Fiander, Attorney at Law
Post Office Box 624
White Swan, Washington 98952

Dear Mr. Fiander:

In a letter of February 5, 1997 from Ross K. Sockzehigh, Tribal Council Chairman to Fred Kiga, Director of the Department of Revenue, he wrote, in part. "Please consider this a courtesy notice, and a standing notice, that the Yakama Nation will continue to transport cigarettes for delivery to the Yakama Nation via licensed interstate commerce carriers." The following day, your letter to Mr. Kiga suggested that because this notice to transport unstamped cigarettes had been given by Chairman Sockzehigh, there should be no further seizures of cigarettes destined for the Yakama Nation. Notification to the Department of Revenue and approval by the department is required for each shipment of unstamped cigarettes before shipment into the state. The February 5th letter does not meet these notification requirements.

I have enclosed a "Pre-Notification Of Unstamped Cigarette Shipments" form for your use, duplication, and distribution. The Yakama Indian Nation may fax their notifications to us at (360) 586-2163, or mail it to the address on this letterhead. The notification must be

received and approved by the Department prior to transporting the unstamped cigarettes into the state. Any shipment of unstamped cigarettes that has not been approved will be subject to seizure.

The unstamped cigarette shipments will be deducted from the annual allocation of tax free cigarettes for the Yakama Indian Nation. The annual allocation for the Yakama Indian Nation for the July 1, 1996 through June 30, 1997 period is 253,716 cartons of cigarettes. The Yakama Indian Nation was notified of the allocation amount on May 31, 1996. Once the allocation is exhausted, the cigarettes will require Washington's tax-paid cigarette tax stamps to be affixed to each package with payment of Washington's cigarette tax.

If you have questions, you may call me at (360) 753-2871.

Sincerely,

/s/ Gary O'Neil
Gary O'Neil, Assistant Director
Special Programs Division

Enclosure

cc: The Honorable Ross K. Sockzehigh, Chairman
Yakama Indian Nation

[LOGO] State of Washington
Department of Revenue
Special Programs Division
PO Box 47477
Olympia, WA 98504-7477

PRE-NOTIFICATION OF UNSTAMPED CIGARETTE SHIPMENTS

Only Washington licensed wholesalers in their own vehicles may transport unstamped cigarettes in Washington without giving advance notice to the Department of Revenue. All others, including Indian tribal organizations, must use this form to report, in advance, the transportation of unstamped cigarettes in Washington. This form must be received by us before transportation is commenced. You can fax this notice to us at (360) 586-2163 or you can mail it to the address at the top of this form.

Name of person filing report: _____

Phone No.: _____

Title of person filing report: _____

Signature: _____

Date of notification: _____

Method of shipment: _____

Date of shipment: _____ Name of carrier: _____

NUMBER OF CIGARETTE CARTONS BEING SHIPPED: _____ INVOICE NO.: _____

Seller's name: _____

Seller's address: _____
City State Zip

Seller's contact name: _____ Phone No.: _____

Purchaser's name: _____

Delivery address: _____
City State Zip

Purchaser's contact name: _____

Phone No.: _____

See the reverse side for the law on transporting unstamped cigarettes. There are papers required to be carried during transportation. Unstamped cigarettes can be purchased only by authorized purchasers that are defined in the law. Violations can mean seizure of the cigarettes and method of conveyance and the issuance of tax assessments including the penalty of $10 per package. For more information, you can call the Special Programs Division at (360) 753-5564.

_____

(2)

No. 99-636

Supreme Court, U. S.
F I L E D
DEC 10 1999
CLERK

In the

SUPREME COURT OF THE UNITED STATES

YAKAMA INDIAN NATION,
Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General
State of Washington
JOHN S. BARNES*
Assistant Attorney General
400 General Admin. Bldg.
P.O. Box 40123
Olympia WA 98504-0123
(360) 753-5528
Counsel for Respondent
** Counsel of Record*

22pp

QUESTION PRESENTED

Respondent would restate the question presented in petitioner Yakama Indian Nation's petition for writ of certiorari as follows:

> Whether an administrative forfeiture proceeding following a valid seizure of contraband cigarettes violates the Indian Tribe's sovereign immunity where the proceeding is triggered by the Tribe's claim of ownership and right to possession of the contraband cigarettes.

TABLE OF CONTENTS

QUESTION PRESENTED

STATEMENT OF THE CASE.....1

REASONS WHY THE PETITION SHOULD BE DENIED.....4

A. The Department Did Not Initiate An Action Against The Yakama Indian Nation In Violation Of The Tribe's Sovereign Immunity By Offering The Nation An Opportunity To Contest The Seizure In An Administrative Hearing.....5

B. Because the Nation Initiated the Administrative Forfeiture Action, Its Sovereign Immunity is not at Issue And There is No Conflict With College Savings Bank. 9

CONCLUSION.....12

APPENDIX

TABLE OF AUTHORITIES

Cases

Bennis v. Michigan, 516 U.S. 442 (1995) 7

California Franchise Tax Board v. Jackson, 184 F.3d 1046 (9th Cir. 1999) 11

Clark v. Barnard, 108 U.S. 436 (1883) 11

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999) 4, 6, 9

Gardner v. New Jersey, 329 U.S. 565 (1947) 10

Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273 (1906) 11

In re Platter, 140 F.3d 676 (7th Cir. 1998) 11

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 6

Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991) 6

One 1958 Plymouth Sedan v. Commonwealth of Pa, 380 U.S. 693 (1965) 6

One Lot Emerald Cut Stones v. U.S., 409 U.S. 232 (1972) 7

People of Porto Rico v. Ramos, 232 U.S. 627 (1914) 11

U.S. v. Bank of New York & Trust Co., 296 U.S. 463 (1936) 9

U.S. v. Gord, 77 F.3d 1192 (9th Cir. 1996) 1, 6, 7

United States v. Baker, 63 F.3d 1478, (9th Cir. 1995) 1, 6

United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) 7

Washington v. Confederated Tribes of Colville Indian Res., 447 U.S. 134 (1980) 5

Statutes

RCW 82.24.135(5) 6

Wash. Rev. Code § 82.01.060 1

Wash. Rev. Code § 82.24.020 1

Wash. Rev. Code § 82.24.030 1

Wash. Rev. Code § 82.24.135 ..... 2, 7

Wash. Rev. Code § 82.24.135(3) 8

Wash. Rev. Code § 82.24.135(5) 8

Wash. Rev. Code § 82.24.250 1

Wash. Rev. Code § 82.24.250(4) 1

Wash. Rev. Code § 82.24.250(6) 1

Rules

Rule 10 Supreme Court 4

Wash. Admin. Code § 458-20-192 1

Regulations

28 U.S.C § 1441(a) 4

28 U.S.C. § 1331 4

28 U.S.C. § 1362 4

STATEMENT OF THE CASE

Washington's Cigarette Excise Tax. The State of Washington imposes a cigarette excise tax on the sale, use, consumption, possession, and distribution of cigarettes in the state. *See* Wash. Rev. Code § 82.24.020 (Pet. App. 43a-44a). The Washington State Department of Revenue (the "Department") is charged with the responsibility for collecting certain excise taxes, including the cigarette excise tax. Wash. Rev. Code § 82.01.060 (Pet. App. 42a). In order to enforce collection of the cigarette tax, the Department has designed and printed stamps to be affixed to the smallest container or package that will be handled, sold, used, consumed, or distributed in Washington, to readily ascertain by inspection whether the cigarette tax has been paid. Wash. Rev. Code § 82.24.030 (Pet. App. 45a).

Wash. Rev. Code § 82.24.250 lists the only persons authorized to possess unstamped cigarettes. They are a wholesaler or retailer, licensed under Washington law; the United States or an agency thereof; and any person including an *Indian tribal organization* that provides the Department with notice it is bringing or causing to be brought into the state unstamped cigarettes. (Pet. App. 51a-53a). Under Washington law, all deliveries of unstamped cigarettes to Indian reservations in Washington must be preapproved by the Department. *United States v. Baker*, 63 F.3d 1478, 1483 (9th Cir. 1995); *U.S. v. Gord*, 77 F.3d 1192 (9th Cir. 1996); Wash. Admin. Code § 458-20-192 (App. 1a). Preapproval is obtained by giving advance notice to the Department. In the absence of such notice, any unstamped cigarettes are considered contraband and are subject to seizure and sale. *See* Wash. Rev. Code §§ 82.24.250(4),(6) (Pet. App. 51a-53a); *Baker*, 63 F.3d at 1489.

The Seizure of Contraband Cigarettes. At approximately 3:45 a.m. on January 16, 1997, a Washington State Patrol trooper observed a black Peterbuilt truck with trailer cross the scales at a weigh station in Plymouth, Washington, at the Washington-Oregon border. 176 F.3d at 1244; (Pet. App.

3a). The trooper requested the driver of the vehicle to produce all permits, registration, and licensing documents, along with his bill of lading. *Id.*

The driver produced a bill of lading indicating that he was carrying a load of cigarettes apparently owned by and en route to the Yakama Indian Nation at Toppenish, Washington. *Id.* While checking the load of the truck, the state trooper noticed individual cigarette packages that did not bear Washington State tax stamps. *Id.* The trooper contacted the Department to ascertain whether the Department had received advance notice of the shipment of unstamped cigarettes to the Nation. The Department had not. *Id.* Upon proper application to the Benton County Superior Court, the Department secured a search warrant to search the trailer for contraband cigarettes. *Id.* Later that day, the Department searched the trailer, seized the contraband cigarettes, and stored them in a warehouse in Pasco, Washington. *Id.*

The Nation's Claim of Ownership. On January 17, 1997, the Department notified the shipper by letter that the cigarettes had been seized as contraband under Washington law (Pet. App. 55a-56a). The Department enclosed a notice of seizure and sale of contraband goods and an inventory of confiscated cigarettes (Pet. App. 58a-60a). The letter put the shipper on notice that it had 15 days to file a written claim of ownership or right to possession of the cigarettes seized. Because the bill of lading indicated a destination of Toppenish, Washington and identified the purchasers as several Yakama Indian Nation accounts, the Department sent a courtesy copy of the notice of seizure and sale of contraband goods and instructions on how to file a written claim to the chair of the Yakama Tribal Council (Pet. App. 57a-60a). The Nation sent a letter to the Department, claiming ownership of the seized cigarettes and demanding their immediate return. 176 F.3d at 1244; (Pet. App. 3a). Pursuant to Wash. Rev. Code § 82.24.135, the Department then sent the Nation notice of an administrative forfeiture hearing, in which the Nation could challenge the

seizure and to assert its claim to the cigarettes. 176 P.3d at 1244; (Pet. App. 3a-4a).

Proceedings in the District Court. Instead of participating in the hearing, the Nation filed a complaint against the Department in the Federal District Court for the Eastern District of Washington seeking return of the cigarettes and declaratory and injunctive relief. 176 P.3d at 1244; (Pet. App. 4a). At the same time, the Nation sought to remove the administrative hearing to the district court pursuant to 28 U.S.C. § 1441. 176 F.3d at 1245; (Pet App. 4a). Due to the perishable nature of the cigarettes, the Department sold the cigarettes at auction for $235,000. *Id.* Because the cigarettes were sold to a licensed cigarette wholesaler, no taxes were collected upon the sale of the cigarettes. The district court ordered the gross proceeds from the auction to be paid into the registry of the court. *Id.*

The Nation moved to dismiss the removed forfeiture proceeding, arguing that the Department could not exercise jurisdiction over a sovereign nation or its property. *Id.* The Nation also sought leave to amend its original action against the Department to include ultra vires claims against the individual state officer involved in the seizure and those individuals responsible for enforcement of the statute. *Id.* The Department moved to dismiss the Nation's complaint under the Eleventh Amendment and to remand the removed administrative proceeding to the Department for hearing on the Nation's claim to the cigarette proceeds. 176 F.3d at 1245; (Pet. App. 4a-5a).

The district court granted both of the Department's motions, denied the Nation's motions, and ordered disbursement of the auction proceeds to the Department. 176 F.3d at 1245; (Pet. App. 5a). The district court determined that the Eleventh Amendment barred the Nation's action against the Department for declaratory and injunctive relief and for return of the cigarette proceeds. Pet. App. 5a-6a. The district court also determined that it did not have jurisdiction to hear the removed administrative forfeiture proceeding because the proceeding was

not a state court action under 28 U.S.C § 1441(a), and because the proceeding did not implicate a federal question under 28 U.S.C. § 1331 or § 1362, respectively. (Pet. App. 21a-23a). The district court later denied the Nation's motion for reconsideration, but stayed disbursement of the auction proceeds to preserve the status quo pending appeal. 176 F.3d at 1245; (Pet. App. 5a).

The Ninth Circuit Decision. The Nation appealed to the Ninth Circuit Court of Appeals. The Court of Appeals affirmed the district court order denying the Nation leave to amend its complaint to add individual state officers as defendants, and in doing so the court reached the merits of the sovereign immunity issue. 176 P.3d at 1245-1248; (Pet. App. 6a-12a). The Court of Appeals concluded that application of the State's forfeiture process to the Nation and its property did not violate tribal sovereign immunity because it was the Nation's claim of ownership and demand for return of the seized cigarettes that initiated the administrative hearing. 176 P.3d at 1247-1248; (Pet. App. 11a). Accordingly, the Ninth Circuit held that the Nation's sovereign immunity was not implicated, that the Nation had no federal right requiring vindication in a federal court, and that it would, therefore, be futile to allow the Nation to amend its complaint to add individual state officers as defendants. 176 P.3d at 1247-1248; (Pet. App. 11a-12a).

REASONS WHY THE PETITION SHOULD BE DENIED

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." Respondent, submits that the Ninth Circuit Court of Appeal's decision here is not in conflict with this Court's recent decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999) and there are no other compelling reasons to grant the Yakama Indian Nation's Petition.

A. The Department Did Not Initiate An Action Against The Yakama Indian Nation In Violation Of The Tribe's Sovereign Immunity By Offering The Nation An Opportunity To Contest The Seizure In An Administrative Hearing.

While the Nation enjoys sovereign immunity from suit by the States, sovereign immunity does not allow the Nation to ignore the valid tax laws of the States with impunity. In *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134 (1980), this Court addressed the State of Washington's cigarette tax enforcement practices and concluded that the State could seize off-reservation unstamped cigarettes. This Court so concluded by determining that tribal rights to independence must be balanced against the needs of the States to enforce their tax laws, and that off-reservation seizures constitute a minimal burden on tribes when a tribe has refused to comply with valid state tax obligations. *Id.* at 161-62.

Here, the Nation does not contend that Washington's requirement that tribes first notify the Department and get its approval before transporting unstamped cigarettes into Washington is not a valid tax regulation. Nor does the Nation challenge the State's seizure of cigarettes in this case. Pet. at 11 n.6.[1] Instead, the Nation argues that the State cannot forfeit the

---

[1]While the Nation does not contest the State's seizure in this case, it nevertheless questions the Ninth Circuit's determination that the State may lawfully seize truckloads of unstamped cigarettes owned by a tribe when the cigarettes are en route to the reservation. This Court has previously approved of off-reservation seizure of unstamped cigarettes regardless of who owns them at the time. In *Colville* (in which the Yakama Indian Nation was a party), this Court recognized that the burden of seizure would fall on Indian tribes, not non-Indian tribal cigarette suppliers. In finding that Washington's interest in enforcing its valid taxes was sufficient to justify these seizures, this Court stated: "Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed. . . By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." 447 U.S. at 161-62. This Court expressed

cigarettes without conducting an adjudicative hearing, and under *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), such a hearing cannot be conducted if the property owner enjoys sovereign immunity and has not consented to suit. The argument has no merit. A forfeiture hearing is required only if a person steps forward and claims ownership of the cigarettes or right to possession of them. RCW 82.24.135(5). (Pet. App. 49a). That is what happened in this case. Where the Nation has affirmatively requested an administrative hearing before the Department to contest the seizure of its cigarettes, the Nation's sovereign immunity is never implicated.

Despite the Nation's arguments to the contrary, the Department has not initiated suit against the Nation and thereby violated its sovereign immunity merely by providing the Nation an opportunity to contest the seizure of its cigarettes. Once an Indian tribe has violated a reasonable state tax regulation, and the State has seized non-complying cigarettes off the reservation, the cigarettes are contraband.[2] *See United States v. Baker*, 63 F.3d

---

no opinion on whether the State could enter onto the reservation to seize stocks of cigarettes which are intended for sale to nonmembers and sell these stocks in order to obtain payment of the taxes due. *Id.* at 162.

In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991), this Court held that the doctrine of sovereign immunity prevented the Oklahoma Tax Commission from enforcing its assessment for back taxes by direct suit against the Tribe. Citing *Colville* and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), however, this Court determined that States may collect the sales tax either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supply unstamped cigarettes to the tribal store. Neither remedy infringed upon tribal sovereignty. *See also U.S. v. Gord*, 77 F.3d 1192 (1996)(under Washington law, all unstamped unapproved cigarettes are "subject to seizure[,] ... tax and penalties," even if possessed by and distributed to Native Americans.

[2]Cigarettes that do not bear tax stamps are contraband per se unless possessed by a licensed Washington wholesaler, or a person (including an Indian tribe) who has given advance notice of the shipment to the State and has received its approval. Wash. Rev. Code §§ 82.24.130(3), 82.24.250, and 82.24.260. The Nation's reliance on *One 1958 Plymouth Sedan v. Commonwealth of Pa*, 380 U.S. 693 (1965), in support of its claim for return

1478, 1488 (9th Cir. 1995); *U.S. v. Gord*, 77 F.3d 1192 (1996). The state is then entitled to process the offending cigarettes as contraband, subject to compliance with the ordinary demands of due process.[3]

Wash. Rev. Code § 82.24.135 lists the procedures the Department must undertake in all cigarette seizures. Wash. Rev. Code § 82.24.135(5) requires the Department to afford any person who notifies the Department, in writing, of the person's claim of ownership or right to possession a reasonable opportunity to be heard as to their claim or right. The statute does not mandate a hearing be held to complete the forfeiture process, only that a person claiming ownership or right to possession of the cigarettes seized be given an opportunity to be heard if that person so desires. The triggering mechanism is the person's written claim or right to possession of the seized items.

An administrative forfeiture proceeding, unlike a state court action, is not initiated by a complaint. Instead, notice is sent within five days following the seizure to all persons having

---

of the cigarette proceeds is misplaced. In *1958 Plymouth*, the seized item at issue was an automobile used to transport intoxicating liquors. Under Pennsylvania law, automobiles used to transport intoxicating liquor not bearing Pennsylvania tax seals could be forfeited after a hearing. Because the State of Pennsylvania could not admit the liquor into evidence due to Fourth Amendment violations, this Court held that the proceeding to forfeit the automobile could not stand alone because the automobile could only be forfeited after a determination that the automobile was in fact transporting contraband. The intoxicating liquor, however, was contraband since it did not bear Pennsylvania tax seals. See *also United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984)(an unlicensed firearm dealer's acquittal on criminal charges does not preclude forfeiture proceedings against those firearms); *One Lot Emerald Cut Stones v. U.S.*, 409 U.S. 232 (1972)(a forfeiture of imported merchandise not declared to United States Customs upheld despite owner's acquittal on smuggling charges). Similarly, the unstamped cigarettes here are contraband since the Nation did not first notify the Department and get its permission before transporting the unstamped cigarettes into Washington.

[3]The Nation does not complain that Washington's forfeiture scheme violates due process. Nor could the Nation successfully make such an argument. *See, e.g., Bennis v. Michigan*, 516 U.S. 442 (1995).

any known right or interest therein, of the seizure and intended forfeiture of the seized property. Wash. Rev. Code § 82.24.135(3). If no person notifies the Department in writing of the person's claim or right to possession of the items seized within fifteen days of the date of the notice of seizure, the item seized is considered forfeited. Wash. Rev. Code § 82.24.135(4). If any person notifies the Department in writing of that person's claim of ownership or right to possession of the items seized, the person or persons shall be afforded a reasonable opportunity to be heard as to their claim or right. Wash. Rev. Code § 82.24.135(5).

If any person claiming ownership or right to possession of the items seized does not want to have its claim decided in an administrative setting and the aggregate value of the items seized is more than five hundred dollars, that person can bring an action for return of the seized items in the superior court of the county in which the property was seized. Wash. Rev. Code § 82.24.135(5).

On January 20, 1997, the Nation notified the Department of its claim of ownership (thereby challenging the Department's authority to seize and sell the cigarettes) and demanded the return of the cigarettes. 176 F.3d at 1244; (Pet. App. 3a). The Nation's claim of ownership or right to possession of the seized cigarettes is what triggered the forfeiture hearing. The Nation incorrectly interpreted the Department's willingness to conduct a hearing as an action against the Nation instead of an action initiated by the Nation. Whether an administrative forfeiture hearing or a superior court proceeding is actually held, however, is up to the Nation. The Nation is always free to forgo the administrative forfeiture hearing by withdrawing its demand for return of the cigarette proceeds.

B. Because the Nation Initiated the Administrative Forfeiture Action, Its Sovereign Immunity is not at Issue And There is No Conflict With College Savings Bank.

In *College Savings Bank*, a bank that sold deposit contracts for funding college education brought an action in federal district court against the Florida Prepaid Postsecondary Education Expense Board (which sold similar products), alleging unfair competition under the Lanham Act based on the Board's alleged false advertising. This Court was faced with the question whether provisions of the Lanham Act were effective to permit suit against a State for its alleged misrepresentation of its own product--either because the Act effects a constitutionally permissible abrogation of state sovereign immunity, or because the Act operated as an invitation to waiver of such immunity which is automatically accepted by a State's engaging in the activities regulated by the Act. This Court sided with Florida that its sovereign immunity was neither validly abrogated nor voluntarily waived. This Court concluded that there is "no place" for the doctrine of constructive waiver in sovereign immunity jurisprudence. *Id.* at 2227.

College Savings Bank is easily distinguishable from the present case. There a bank brought an action against the State of Florida. Florida was a defendant. Here the Nation initiated the administrative forfeiture proceeding by claiming its right to possession of the cigarettes. The Nation is the plaintiff. Bringing an action as a plaintiff simply does not implicate the plaintiff's sovereign immunity.

In *U.S. v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), the United States, claiming to be the owner by assignment of certain funds which originally had belonged to three Russian insurance companies, brought suits for accounting and delivery in federal district court. The defendants held the funds in question under orders and judgments of a state court, in connection with the liquidation of the companies. The United States by motion in the district court sought to enjoin distribution

of the funds and to require payment of them to it. This Court, affirming dismissal of the complaints and denial of the injunction, held that the state court obtained jurisdiction over the funds, and questions as to the rights of the parties who were before it, or of those who might come before it, were legal questions which should be resolved in that court. This Court further held that there was "no merit" in the suggestion "that the United States, in presenting its claim in the state proceedings, would be compelled to take the position of a defendant--being sued without its consent." In intervening to present its claim, "the United States would be an actor--voluntarily asserting what it deemed to be its rights--and not a defendant." There would be no impairment "of any rights the government may possess, or any sacrifice of its proper dignity as a sovereign," if it prosecuted its claim in the appropriate state forum where the funds were held. 296 U.S. at 480-81. Sovereign immunity is simply not implicated in such a procedure.

In certain instances, a sovereign is faced with the choice of defending its right, claim or interest in property in a foreign forum or not at all. This is particularly so when the foreign forum has possession or control of the res. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), a railroad filed its petition for reorganization shortly after receiving notice from the Attorney General of New Jersey that he would apply to a state court for summary judgment for unpaid taxes of the railroad and seek to sell its property in satisfaction of the judgment. The State of New Jersey filed a proof of claim for unpaid taxes in the railroad's bankruptcy proceeding. The railroad filed objections to the State's claim and the State, through its Attorney General, filed replies to the objections.

The trustee filed with the reorganization court a petition for adjudication of New Jersey's tax claim. The State argued that entertaining the petition would constitute a prohibited suit against the State. Rejecting that argument, this Court held that the reorganization court had jurisdiction over the proof and allowance of the tax claims, and that the exercise of that power

was not a suit against the State. This Court explained that it is traditional bankruptcy law that "he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the consequences of that procedure." 329 U.S. at 573. If the claimant is a State, the procedure of proof and allowance "is not transmitted into a suit against the State because the court entertains objections to the claim." *Id.* "When the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim." 329 U.S. at 574. *See also Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284-289 (1906).[4]

Because the Nation is not a "defendant" in the administrative forfeiture proceeding (the same role the Nation would have if it chose to challenge the seizure in state court), the Nation's sovereign immunity is not implicated.

---

[4]Similar waivers of sovereign immunity have been found in many contexts. *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914)(Porto Rico voluntarily petitioned to be made a party, asserting rights to the property in controversy in ejectment action brought by defendant, a citizen of Porto Rico, against a subject of Great Britain); *In re Platter*, 140 F.3d 676 (7th Cir. 1998)(inasmuch as state voluntarily chooses to enter bankruptcy case when it initiates adversary proceeding, state removes itself from Eleventh Amendment protection by starting one); *California Franchise Tax Board v. Jackson*, 184 F.3d 1046 (9th Cir. 1999)(State taxing authority waived its Eleventh Amendment sovereign immunity with regard to bankruptcy court's determination that debtor's tax liability debts were dischargeable, pursuant to debtors' objection, when authority filed proof of claim for unpaid state income taxes.

CONCLUSION

For the above mentioned reasons, the Ninth Circuit's decision does not conflict with this Court's subsequent decision in *College Savings Bank* and the Nation's petition for writ of certiorari should be denied.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General
JOHN S. BARNES
Assistant Attorney General
(Counsel of Record)
400 General Admin. Bldg.
PO Box 40123
Olympia WA 98504-0123
(360) 753-5528
Attorneys for Respondent

December 10, 1999

APPENDIX

REVISED CODE OF WASHINGTON (RCW)

82.24.080 Legislative intent--Taxable event--Tax liability. (1) It is the intent and purpose of this chapter to levy a tax on all of the articles taxed under this chapter, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles taxed under this chapter is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

(2) It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by subsection (1) of this section but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. A precollection obligation may not be imposed upon a person exempt from the tax who sells, distributes, or transfers possession of cigarettes to another person who, by law, is exempt from the tax imposed by this chapter or upon whom the obligation for collection of the tax may not be imposed. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

(3) In the event of an increase in the rate of the tax imposed under this chapter, it is the intent of the legislature that the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed articles after the effective date of the rate increase shall be liable for the additional tax, or its precollection obligation as required by this chapter, represented by the rate increase. The failure to pay the additional tax with respect to the first taxable event after the effective date of a rate increase shall not prevent tax liability for the additional tax from arising from a subsequent taxable event.

WASHINGTON ADMINISTRATIVE CODE (WAC)

458-20-192 Indians--Indian reservations. Definitions

The term "Indian reservation," as used herein, means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law, or executive order and which are areas currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of Interior: Chehalis, Colville, Hoh, Kalispell, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinault, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

The term "Indian tribe," as used herein, means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

The term "Indian," as used herein, means a person duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

Note: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Under the revenue laws of the state of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:

. . . .

Cigarette Tax

Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery or sale and delivery by any person of unstamped cigarettes to Indians or tribal vendors for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department of revenue. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the vendor. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the vendor's place of business, records indicating the percentage of such trade that has historically been realized by the vendor, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of unstamped cigarettes to any reservation or to any Indian or tribal vendor thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently

completed calendar or fiscal year by the Tobacco Tax Institute, multiplied by the resident enrolled membership of the affected tribe. Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal vendor without advance approval by the department will result in the treatment of those cigarettes as contraband and subject to seizure and in addition the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. Approval for sale or delivery to Indian or tribal vendors of unstamped cigarettes will be denied where the department finds that such Indian or tribal vendors are or have been making sales in violation of this rule.

Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.

Revised November 14, 1980.

REPLY

BRIEF

Supreme Court, U.S.
FILED
DEC 20 1999
CLERK

(3)

No. 99-636

In The

Supreme Court of the United States

YAKAMA INDIAN NATION,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

LESLIE R. WEATHERHEAD
WITHERSPOON, KELLEY, DAVENPORT & TOOLE
1100 US Bank Bldg.
W. 422 Riverside
Spokane, WA 99201
(509) 624-5265

CHARLES J. COOPER*
ALAN K. PALMER
ANDREW G. MCBRIDE
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

BRIAN S. KOUKOUTCHOS
28 Eagle Trace
Mandeville, LA 70471
(504) 626-4409

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

California Franchise Tax Bd. v. Jackson, 184 F.3d 1046 (9th Cir. 1999) 7

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) 4, 5, 8

Franchise Tax Bd. of California v. United States Postal Serv., 467 U.S. 512 (1984) 2

Gardner v. New Jersey, 329 U.S. 565 (1947) 6

Gunter v. Atlantic Coast Line R.R. Co., 200 U.S. 273 (1906) 7

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 3

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) 2, 4

Porto Rico v. Ramos, 232 U.S. 627 (1914) 7

Schlossberg v. Comptroller of Treasury, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998) 6

Shaffer v. Heitner, 433 U.S. 186 (1977) 3

United States v. Bank of New York & Trust Co., 296 U.S. 463 (1936) 7

STATUTES

28 U.S.C. § 41 (1999) 7

Wash. Rev. Code § 82.24.135(1) 1

REPLY BRIEF FOR THE PETITIONER

Respondent Washington Department of Revenue offers one – and only one – reason why a writ of certiorari should be denied. The Tribe's sovereign immunity, we are told, is not implicated because respondent did not initiate an action against the Tribe or its property. Brief in Opposition ("Br. Opp.") 5, 6, 8, 9, 11.

This is both false and irrelevant. Both of the courts below found precisely the opposite, and respondent itself has already formally admitted precisely the opposite. The Ninth Circuit stated that the Tribe was subjected to "an administrative forfeiture proceeding *that the Department instituted* after it seized the cigarettes." Appendix to Petition for a writ of certiorari ("App.") 2a (emphasis added). The district court characterized this forfeiture proceeding as *"an action brought by a state against a piece of property."* App. 23a (emphasis added).

The Washington statute on cigarette tax seizures provides that a proceeding on "[f]orfeiture shall be deemed to have commenced by the seizure." Wash. Rev. Code § 82.24.135(1) (App. 47a). After the seizure, respondent, in its own words, sent a "notice of seizure and sale of contraband goods" to the Tribe. Br. Opp. 2. The Tribe, according to respondent, did not file a writ, complaint or pleading, but merely sent a letter to respondent that "demanded" – not a proceeding – but only "the return of the cigarettes." Br. Opp. 8; *see also* Br. Opp. 2 (same). Respondent, in its own words, "sent the Nation notice of an administrative forfeiture hearing." Br. Opp. 2. Respondent characterizes its own "notice of seizure and sale" and "notice of an administrative forfeiture hearing" not

as formal notices with established legal consequences, but as mere "courtesy cop[ies]." Br. Opp. 2. But as we have already explained, Petition for a writ of certiorari ("Pet.") 9, and respondent does not dispute, sovereign immunity " 'embrace[s] all civil process incident to the commencement or continuance of legal proceedings,' " *Franchise Tax Bd. of California v. United States Postal Serv.*, 467 U.S. 512, 518 (1984) (citation omitted), including seizures and attachments and tax assessments. *Id.* at 522-23.[1]

---

[1] Respondent asserts that the courts have sustained its right to seize unstamped cigarettes directly from sovereign Indian tribes. Br. Opp. 5 & n.1. But respondent's only authorities are cases that we have already distinguished. *See* Pet. 11 n.6. Those cases involved seizures *not* from sovereign Indian tribes, but rather from (a) non-sovereign out-of-state wholesalers, or (b) non-sovereign individuals involved in interstate cigarette smuggling. Furthermore, those cases expressly noted (and reserved) the distinct questions involved in the seizure of property from a sovereign tribe.

In any event, none of those cases involved the question presented here, which is not whether a state may seize cigarettes it suspects are unstamped contraband, but whether a state may subject a sovereign tribe to the forfeiture proceeding that is necessary before the state can declare the property forfeited and take title to it. Respondent concedes that its forfeiture process is "subject to compliance with the ordinary demands of due process," and that respondent therefore cannot forfeit the Tribe's property without instituting a forfeiture hearing to adjudicate whether, in fact, the cigarettes are contraband. Br. Opp. 7. Therefore, just as in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), a state must seek alternative means to enforce its cigarette tax regime that do not violate tribal immunity. *See* Pet. 12-14.

Moreover, respondent itself has already *formally admitted* the obvious: that it instituted forfeiture proceedings against the Tribe's property. Paragraph V of the Complaint averred that respondent "notified plaintiff that a state adjudicative proceeding was being instituted before an Administrative Tribunal of the Department of Revenue." App. 36a. Respondent's Answer formally admitted that allegation. App. 38a (¶ V.). In the district court, before it adopted its current strategy of factual revisionism, respondent itself characterized its forfeiture proceeding as an "*in rem* action" brought by the State against the Tribe's property. Response Brief of Washington Department of Revenue in the Ninth Circuit at 11, 32.[2]

Even if respondent had its facts straight, its preoccupation with which party filed the first legal shot simply misses the point. Questions of sovereign immunity do not turn on the "empty formalism," *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997), of how a state chooses to label the parties in its adjudicative proceedings. The vital interests that are served by sovereign immunity "are not to be sacrificed to elementary mechanics of captions and

---

[2] The outdated *in rem* fiction does not make the State's action against the Tribe any less a violation of sovereign immunity. " 'All proceedings, like all rights, are really against persons.' " *Shaffer v. Heitner*, 433 U.S. 186, 207 n.22 (1977) (citation omitted). " '[J]urisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Id.* at 207 (citation omitted). Thus, the "fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." *Id.* at 212.

pleading." *Id.* Thus, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), this Court unanimously held that a compulsory counterclaim against a tribe by a state tax agency to collect unpaid cigarette taxes was barred by tribal immunity, even though the tribe was the plaintiff that had sued the Tax Commission in the first place. If sovereign immunity were the facile word-game that respondent supposes, a state could always evade immunity by engaging in this form of self-help, seizing a tribe's property, and then making the tribe petition for a hearing to review the legality of the seizure.

In the end it is irrelevant whether the state denominates itself the plaintiff or the defendant in a forfeiture proceeding, because it is undisputed that the state cannot constitutionally forfeit property without an adjudicative hearing to determine whether the property is indeed contraband subject to confiscation, and such a hearing cannot be conducted if the property owner enjoys sovereign immunity. To be sure, the state can schedule a hearing and declare the sovereign party in default if it fails to participate, but default is only binding if the party has been properly *summoned*, and a summons, of course, is precisely the sort of coercive legal instrument from which a sovereign is immune.

Respondent offers one, and only one, distinction between this case and *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999): "Florida was a defendant. Here the Nation initiated the administrative forfeiture proceeding . . . . " Br. Opp. 9. As demonstrated above, this is simply untrue, and therefore

respondent has provided no basis whatsoever for denying a writ of certiorari. Respondent agrees that *College Savings Bank* bars coercive waivers of sovereign immunity, Br. Opp. 9, and does not question the applicability of that doctrine to tribal sovereigns. Instead, respondent argues only that the Tribe's participation in the State's forfeiture proceeding is voluntary, not coerced, because the Tribe remains free to default, "to forgo the administrative forfeiture hearing" by abandoning the seized property, and thereby to preserve its tribal sovereign immunity. Br. Opp. 8.

But that is precisely *our* point. Respondent simply does not grasp that the forbidden coercion here is granting the Tribe due process and the opportunity to regain its seized property only at the price of surrendering its sovereign immunity. Respondent claims the right to seize tribal property and to keep that property unless the Tribe agrees to waive its sovereign immunity and participate in a forfeiture hearing to determine if the property is indeed contraband subject to state confiscation. Respondent is effectively telling the Tribe, "You may preserve your sovereign immunity, but only at the price of the property we've just seized" – and here that price is $235,000 (the auction price of the seized cigarettes).

With admirable candor, respondent admits that its statutory procedure is to hijack tribal property from a truck on the highway and then to hold it hostage to coerce the Tribe to submit to the State's adjudicatory process. Indeed, respondent does not even attempt to soften its admission by arguing that its ability to enforce state revenue laws would be impaired if it were denied

the power to seize and forfeit suspected contraband cigarettes directly from Indian tribes themselves. Nor could it. As we pointed out in the Petition at 17 & n.13, this Court has recognized that there are adequate enforcement alternatives available to the states that do not involve direct legal action against a sovereign tribe, and respondent does not contend otherwise.

The cases cited by respondent are entirely consistent with the principle that sovereign immunity may not be abrogated in the guise of a coerced waiver. Respondent has failed to identify any authority that supports its contention that one sovereign may seize the property of another sovereign and then condition recovery of the property on submission to its jurisdiction. Rather, the cases cited by respondent involve instances in which a third party and a sovereign claim an interest in the same piece of property and another sovereign opens its courts to permit adjudication of the disputed property right. None of these cases involved even a hint of the sort of administrative extortion committed by respondent here.

In each of the bankruptcy cases cited by respondent, the property at issue was held by a third party, and the sovereign whose courts had jurisdiction made no claim to the property. *See, e.g., Gardner v. New Jersey*, 329 U.S. 565 (1947). Nevertheless, there is a split among the circuits on whether even the implied waiver of sovereign immunity found in the bankruptcy cases remains good law in light of this Court's recent Eleventh Amendment decisions. *Compare Schlossberg v. Comptroller of Treasury*, 119 F.3d 1140, 1145-46 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998) (holding the waiver of sovereign immunity contained in Section 106 of the Bankruptcy Improvement Act

of 1994 to be violative of the Eleventh Amendment) *with California Franchise Tax Bd. v. Jackson*, 184 F.3d 1046, 1049-50 (9th Cir. 1999) (finding that the rationale of *Gardner* survives recent Supreme Court precedent and that Section 106 does not violate the Eleventh Amendment). To the extent these bankruptcy cases have any relevance to the instant case, this split among the circuits underscores the need for this Court to provide guidance to the lower courts on the important principles of sovereign immunity at issue in this case or, at the very least, to ensure that the courts of appeals consider this Court's recent decisions.[3]

The Court's decision in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936) is distinguishable for precisely the same reason: the state whose courts exercised jurisdiction over the property in question made no claim to those assets and thus no coercion was present. Moreover, the sole issue before the Court in *Bank of New York* was whether 28 U.S.C. § 41 conferred exclusive jurisdiction upon federal district courts in suits brought by the United States, and thus the case has no bearing on the issue presented here.

---

[3] Respondent's reliance upon *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273 (1906), is misplaced as the State of South Carolina there was a defendant that was deemed to have waived its sovereign immunity by its appearance in federal court. There is no suggestion that this waiver had been coerced in any manner. Likewise, in *Porto Rico v. Ramos*, 232 U.S. 627 (1914), Puerto Rico's waiver of sovereign immunity was not coerced. Puerto Rico held the property at issue in that case and moved to intervene as a defendant to better protect its property interest. As these cases did not implicate coerced waivers, they simply have no bearing on the present controversy.

CONCLUSION

The Ninth Circuit's endorsement of coercive waivers of sovereign immunity cannot be reconciled with this Court's recent decision in *College Savings Bank*. If the decision below is allowed to stand, no sovereign within our federal system, whether tribe or state, will be safe from extortionate constructive waivers of immunity at the hands of authorities able to seize that sovereign's property. Therefore, the petition should be granted, the judgment of the Court of Appeals vacated, and the case remanded for reconsideration in light of *College Savings Bank*. Alternatively, the petition should be granted and the case set for plenary review.

Respectfully submitted,

CHARLES J. COOPER*
ALAN K. PALMER
ANDREW G. MCBRIDE
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
Suite 200
1500 K Street, N.W.
Washington, D.C. 20005
(202) 220-9600

BRIAN STUART KOUKOUTCHOS
28 Eagle Trace
Mandeville, LA 70471
(504) 626-4409

LESLIE R. WEATHERHEAD
WITHERSPOON, KELLEY, DAVENPORT & TOOLE
1100 US Bank Bldg.
W. 422 Riverside
Spokane, WA 99201
(509) 624-5265

December 17, 1999

**Counsel of Record*